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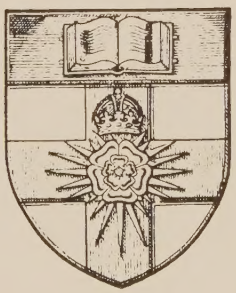

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CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

In re WHITING.

ORMOND *v.* DE LAUNAY.

JOYCE J.

1913

Feb. 27;
March 4;
April 10.

[1912 W. 2739.]

Will—Construction—Gift of Residue to Forty-six named Persons—Codicil—Revocation of Gift to Two of the Number—Confirmation of Will—No Intestacy.

By his will, dated in 1906, the testator gave the proceeds of sale of his residuary real and personal estate upon trust to be divided equally between forty-six named persons, described in the will as being children, or the widows or children of deceased children, of his and his wife's brothers and sisters, including T. W. and F. W. By a codicil he revoked the gifts of the shares in his residuary estate to T. W. and F. W. and in all other respects confirmed his will:—

Held that, although the gift was not a gift to a class, there was no intestacy as to any portion of the residue, but that the whole residue passed under the will, as altered and republished by the codicil, to the persons named in the will omitting F. W. and T. W.

Cheslyn v. *Cresswell* (1763) 3 Bro. P. C. 246, distinguished.

ADJOURNED SUMMONS.

By his will made in June, 1906, the testator, John Whiting, appointed the plaintiffs and John Gregory (since deceased) executors and trustees and after certain devises and bequests gave and devised all the rest and residue of his real and personal estate after the death of his wife unto his trustees upon trust to sell and convert and hold the proceeds upon trust to pay certain legacies and as to all the rest and residue of the proceeds of sale

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"upon trust to be divided equally between the following namely"—the will then gave in full the names of forty-six persons, describing them seriatim as being children or the widows or children of deceased children of his and his wife's brothers and sisters. The list included the defendants (among whom was George Whiting, the testator's heir-at-law) and also two of the testator's nephews, Thomas Whiting and Frederick Whiting.

The testator provided that if any of the named legatees should die in his or his wife's lifetime leaving a child or children living at his or his wife's death who being a son or sons attained the age of twenty-one years or being a daughter or daughters attained that age or married under it then and in every such case the last mentioned child or children should take (and if more than one equally between them) the share which his, her, or their parent would have taken in his residuary trust funds if such parent had survived him and attained twenty-one.

The testator made a codicil to his will providing as follows: "Whereas by my said will I have bequeathed to Thomas Whiting and Frederick Whiting each a share in my residuary estate Now I do hereby revoke the bequests of the said shares to the said Thomas Whiting and Frederick Whiting" and after giving two legacies the codicil concluded "In all other respects I confirm my said will."

The plaintiffs took out this summons for the determination of the question whether the shares in the proceeds of sale of the residuary estate given by the will to Thomas Whiting and Frederick Whiting passed to the other persons entitled under the will to such proceeds of sale, or were undisposed of.

C. Hartree, for the plaintiffs.

Hon. A. Shaw, for the defendant residuary legatees. The intention of the testator is, I submit, clear that he meant his wife's and his own nephews and nieces named in the will other than Thomas and Frederick Whiting to take the whole residue between them, and there is no intestacy: *Vaudrey* v. *Howard* (1); *Harris* v. *Davis* (2); *Clark* v. *Phillips* (3), in which the Vice-

(1) (1853) 2 W. R. 32. (2) (1844) 1 Coll. 416.
(3) (1853) 17 Jur. 886.

Chancellor explains the decision in *Cheslyn* v. *Cresswell* (1) and says that in that case the gift of residue was exactly as if it had been a gift of one-third to each of the residuary legatees named, and could not be read in any other way.

The facts in *Cheslyn* v. *Cresswell* (1) were quite distinct from the facts in this case, and the decision has been doubted from the very first, as appears from Serjeant Hill's note to the report. (2)

The will "in all other respects" is confirmed by the codicil; and the effect of that is to bring the will down to the date of the codicil and effect the same disposition of the testator's estate as if the testator had at that date made a new will containing the same disposition as the original will but with the alterations introduced by the codicil: *Lady Langdale* v. *Briggs* (3); *Burton* v. *Newbery* (4); *In re Fraser* (5); Theobald on Wills, 7th ed. p. 146. The obvious intention of the testator was to dispose of the whole residue and give it to the named legatees other than Frederick and Thomas.

Rolt, for the defendant heir-at-law and next of kin. This is not a gift to a class notwithstanding that the legatees stand in a common relationship to the testator: Jarman on Wills, 6th ed. p. 432; *Kingsbury* v. *Walter*. (6)

There is no gift to any one of the two forty-sixth shares the gift whereof is revoked by the codicil, and the testator died intestate as to these two shares, which devolve upon the heir-at-law and next of kin: *Cheslyn* v. *Cresswell* (1), which exactly covers this case, and was followed and adopted by Lord Cairns in *Sykes* v. *Sykes* (7); *Bagwell* v. *Dry* (8); *In re Wood's Will* (9); and per Lindley L.J. in *In re Palmer* (10); Jarman on Wills, 6th ed. p. 701.

I have examined the record in *Sykes* v. *Sykes* (7) and find that there were words in the codicil confirming the will.

In *Cheslyn* v. *Cresswell* (1) the House adopted the respondent's argument, which is exactly applicable to this case.

(1) 3 Bro. P. C. 246.
(2) (1762) 2 Eden, 123, 126, n.
(3) (1855) 3 Sm. & Giff. 246.
(4) (1875) 1 Ch. D. 234.
(5) [1904] 1 Ch. 726.
(6) [1901] A. C. 187.
(7) (1868) L. R. 3 Ch. 301.
(8) (1721) 1 P. Wms. 700.
(9) (1861) 29 Beav. 236.
(10) [1893] 3 Ch. 369, 372, 373.

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[JOYCE J. That was a decision before the Wills Act.]

Sect. 34 of the Wills Act does not affect this point. In the codicil there is no gift of anything not given by the will.

In *In re Fraser* (1) Stirling L.J. laid down the law in wider terms than it had been previously laid down. *Harris* v. *Davis* (2) was a case quite distinct from this.

[JOYCE J. Nothing has ever been said against that case on this question.]

No ; but no one has ever followed or affirmed it. The frame of the will in that case was peculiar and lent itself easily to the construction put upon it, and Lord Cairns in *Sykes* v. *Sykes* (3) refers to it as a very plain case and as in no way throwing any doubt upon the principle in *Cheslyn* v. *Cresswell.* (4)

The testator in this case has taken away these two shares and not given them to any one, and I submit they are undisposed of.

Hon. A. Shaw in reply.

Cur. adv. vult.

April 10. JOYCE J. The testator in this case by his will, made in June, 1906, disposed of the rest and residue of the proceeds of sale of his real and personal estate by giving it upon trust "to be divided equally between the following, namely," and then a great many persons are mentioned, the number of them being, I think, forty-six. If I rightly understand, these persons comprised all the testator's living nephews and nieces, and also his wife's nephews and nieces, together with the widows of two deceased nephews, and the child of a deceased niece. They include the testator's heir-at-law, the defendant George Whiting, and his next of kin according to the statute.

The residue is composed, roughly speaking, as to about seven ninth parts of real estate, and as to the rest, about two ninth parts, of personalty. The effect, if the will had remained unaltered, would have been to give one forty-sixth, although not so expressed, to each of a number of persons who were not, but possibly might have been, so described or referred to as to constitute a class in the technical sense. If it had been a gift to

(1) [1904] 1 Ch. 726.
(2) 1 Coll. 416.
(3) L. R. 3 Ch. 301.
(4) 3 Bro. P. C. 246.

a class in the technical sense of the word, the share of any one dying before the testator would not have lapsed; and if the gift to one of the members of the class had been revoked, the whole would have gone to the others. (See *Shaw* v. *M'Mahon.* (1))

Then by a codicil made in May, 1908, the testator says: "Whereas by my said will I have bequeathed to Thomas Whiting and Frederick Whiting each a share in my residuary estate now I do hereby revoke the bequests of the said shares to the said Thomas Whiting and Frederick Whiting." Then he gives and bequeaths other legacies, and the codicil concludes with these words: "In all other respects I confirm my said will," this being an expression which is a common form used by Hayes and Jarman in their Concise Forms of Wills, and possibly in some other books of precedents.

The effect of these last words, if there ever could have been any doubt about it, is now, at all events, well settled. The case of *In re Fraser* (2) decides that the effect of confirming a will as altered by a codicil is that the codicil is a republication of the will. There is no doubt about that. Stirling L.J. says: "The effect of this is to bring the will down to the date of the codicil, and effect the same disposition of the testator's estate as if the testator had at that date made a new will, containing the same dispositions as the original will, but with the alterations introduced by the various codicils"; and then he refers to the authorities upon the subject. Further, by section 34 of the Wills Act, which, I agree, was a section the principal object of which was to define the commencement of the Act or prescribe what instruments the Act was not to apply to, it is enacted in general terms that every will re-executed or republished or revived by any codicil "shall for the purposes of this Act" (that is the Wills Act) "be deemed to have been made at the time at which the same shall be so re-executed, republished, or revived."

In the case of *In re Palmer* (3), a very important decision and considered rather startling at the time, Lindley L.J. said this, speaking of *Humble* v. *Shore* (4): "If *Humble* v.

(1) (1843) 4 D. & War. 431.
(2) [1904] 1 Ch. 726, 734.
(3) [1893] 3 Ch. 369, 373.
(4) (1847) 7 Hare, 247.

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Shore (1) laid down any rule of law which had guided conveyancers and others in framing wills, it might be too late for this Court, at all events, to decline to recognise and follow it. But the Vice-Chancellor, in *Humble* v. *Shore* (1), did not profess to lay down any rule of law. On the contrary, he sought for indications of the testator's intention, but could find none which were satisfactory to his mind. Some other judges, following him, have construed similar wills in a similar way. The result in all those cases has been, in my opinion, to miss the intention as expressed, and, unfortunately, to defeat it without sufficient grounds. This line of cases affords a striking illustration of the mischief done by construing one will by paying too much attention to decisions on other wills. Rules of law must be attended to; but if in any case the intention of a testator is expressed with sufficient clearness to enable the Court to ascertain it, the Court ought to give effect to it in that case, unless there is some law which compels the Court to ignore it; and the mere fact that in other wills more or less like it other judges have not been satisfied as to the intentions expressed in them, is not sufficient ground for defeating an intention where the Court holds it to be sufficiently expressed in the particular will which it is called upon to construe."

Now, in the present case, can any lawyer, or other rational being, entertain any doubt as to what was the intention of the testator when he executed the codicil? Was it to leave the two forty-sixth shares, which, but for the codicil, Thomas Whiting and Frederick Whiting respectively would have taken, undisposed of, or to divide the residue of his property among the persons named in the will with the omission of the two, Thomas Whiting and Frederick Whiting, particularly named in the codicil? Not only, in my opinion, is it impossible to doubt what the testator really intended; but, to my mind, the meaning of what he says—of the words used—is perfectly plain to any mind unprejudiced by the consideration of other cases. Still, if there were any real ambiguity, and I had to choose between two possible constructions, I should prefer the one which, in my opinion, plainly would effect the intention of the testator,

(1) 7 Hare, 247.

to one which would have the effect of frustrating that intention. In my opinion, the meaning of this will, read together with the codicil, is perfectly plain. Is there any law or principle, or binding authority, that compels me to decide contrary to my own view? My attention has been called, properly enough, to an old, but not very satisfactory, decision in Brown's Parliamentary Cases—the House of Lords, I admit—but they are reports in which, as is well known, the reasons for the decisions do not appear. That case is *Cheslyn* v. *Cresswell.* (1) After what has been said about *Cheslyn* v. *Cresswell* (1) by some of the most eminent judges, I suppose that in any case that was precisely the same in all its circumstances, one ought to follow *Cheslyn* v. *Cresswell* (1), leaving the Court of Appeal, or the House of Lords, to reverse the decision; but, in my opinion, the circumstances of the present case are not precisely the same as they were in *Cheslyn* v. *Cresswell.* (1) I consider that there are material differences. Besides, modern decisions, and the Wills Act, will not allow me to ignore the final words of the codicil to which, it is possible, too little attention was paid in *Cheslyn* v. *Cresswell.* (1) Further, if my judgment is to be determined by a comparison of this will with others, the present case is much more like *Harris* v. *Davis* (2), where Knight Bruce V.-C., while recognizing *Cheslyn* v. *Cresswell* (1), succeeded in distinguishing the case before him; and, having so clear an opinion as I have upon the particular testamentary instruments here in question, I cannot allow myself to be diverted from what I consider to be the true view by a consideration of decisions upon other wills similar, but not the same.

I am going to follow what Sir George Jessel has said on several occasions, and be guided by that. Perhaps the most important is the passage in the judgment in *Aspden* v. *Seddon* (3) where he says: "No judge objects more than I do to referring to authorities merely for the purpose of ascertaining the construction of a document; that is to say, I think it is the duty of a judge to ascertain the construction of the instrument before him, and not to refer to the construction

(1) 3 Bro. P. C. 246; reported in the Court below in 2 Eden, 123.

(2) 1 Coll. 416.

(3) (1875) L. R. 10 Ch. 394, 397, n.

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put by another judge upon an instrument, perhaps similar, but not the same. The only result of referring to authorities for that purpose is confusion and error, in this way, that if you look at a similar instrument, and say that a certain construction was put upon it, and that it differs only to such a slight degree from the document before you, that you do not think the difference sufficient to alter the construction, you miss the real point of the case, which is to ascertain the meaning of the instrument before you. It may be quite true that in your opinion the difference between the two instruments is not sufficient to alter the construction, but at the same time the judge who decided on that other instrument may have thought that that very difference would be sufficient to alter the interpretation of that instrument. You have, in fact, no guide whatever; and the result especially in some cases of wills, has been remarkable. There is, first, document A, and a judge formed an opinion as to its construction. Then came document B, and some other judge has said that it differs very little from document A—not sufficient to alter the construction—therefore he construes it in the same way. Then comes document C, and the judge there compares it with document B, and says it differs very little, and therefore he shall construe it in the same way. And so the construction has gone on until we find a document which is in totally different terms from the first, and which no human being would think of construing in the same manner, but which has by this process come to be construed in the same manner." Then again, in a somewhat similar way, Sir George Jessel deals with the question in *Hack* v. *London Provident Building Society* (1) where he says: "In the next place nothing is better known than that on a question of mere construction even the decision of the Appeal Court on similar grounds is not binding on another Court, and much less on a Court of equal jurisdiction. As regards the construction of the instrument, even if there are the identical words, although we follow them, they are not strictly binding; but on similar words they are not binding."

I intend to proceed on the authority of the cases I have just

(1) (1883) 23 Ch. D. 103, 111.

referred to, being clear as I am about the meaning of the will and codicil here. I hold that in this case there is no intestacy.

Solicitors: *Meredith, Mills & Clark, for E. & E. B. Ormond, Wantage; Langhams.*

R. M.

In re HAYGARTH.
WICKHAM *v.* HAYGARTH.

[1912 H. 881.]

Will—Construction—Provision for Hotchpot—Supplying Omission by Inference.

The testator directed three several sums which he had charged upon his real estate to be raised and held upon the ordinary trusts of a settled legacy in favour of each of his cousins A., B., and C. and her issue. Subject to the charge he devised his real estate upon certain limitations, which had since determined, with an ultimate trust for sale and division of the proceeds equally between such of his five named cousins, including A., B., and C., as should be living when the trust for sale came into operation, but subject to the following provision for hotchpot:—"but so that if" A., B., and C. "or any of them shall then be living or shall have previously died leaving issue then living such of the said sums . . . . hereinbefore directed to be set apart for their benefit as shall have been so set apart for the benefit of the one or more of them so dying and her issue shall be brought into hotchpot and accounted for in the division hereby directed to be made of the net proceeds of my family estate." The will contained a subsequent declaration that the child or children attaining twenty-one, or if daughters marrying, of such of his five cousins as should be dead when the trust for sale came into operation should take the share in the net proceeds of his family estate which his, her, or their parent would have taken if such parent had not died before the trust for sale had come into operation.

C. died before the trust for sale came into operation leaving a child still living, and the question to be determined was whether A. and B., as well as C.'s child, were bound to bring into hotchpot their settled legacies:—

Held, that the later portion of the hotchpot clause must be read as applying to each of the two contingencies mentioned in the introductory portion, and that in the division of the proceeds of the testator's real estate A. and B., as well as C.'s child, must bring their settled legacies into hotchpot.

ADJOURNED SUMMONS.

The testator devised his family estate unto and to the use of

JOYCE J. 1913 HAYGARTH, *In re.* WICKHAM *v.* HAYGARTH.

his trustees and their heirs upon trust by mortgage of the same or by other means as in his will mentioned to raise three several sums of 4000*l.*, 3000*l.*, and 3000*l.*, to be set apart and appropriated as to the sum of 4000*l.* for the benefit of his cousin the defendant Frederika Ponsonby Holmes, as to one sum of 3000*l.* for the benefit of his cousin the defendant Georgina Elizabeth Whelpton, and as to the other sum of 3000*l.* for the benefit of his cousin Katharine Aimee Swayne, and to be held on the trusts thereinafter declared. Subject to this trust the testator directed his trustees to stand seised of his family estate upon trusts which had since determined with an ultimate trust, in the events which had happened, for sale.

The testator directed the sum to be set apart for each of the above-named ladies to be held upon trust for her for life with power to appoint a life or smaller interest to a surviving husband and then for the lady's children or remoter issue as she should appoint and in default for her children equally who being sons should attain the age of twenty-one years or being daughters should attain that age or previously marry.

The testator declared that if his family estate should be sold the proceeds subject to a deduction of 500*l.* should be held by his trustees in trust for such of his five cousins the defendant Frederika Ponsonby Holmes, Henry Barkley Holmes, Arthur Light Holmes, the defendant Georgina Elizabeth Whelpton, and the above-named Katharine Aimee Swayne as should be living when the direction for sale should come into operation and if more than one to be divided between them in equal shares, "but so that if the said Frederika Ponsonby Holmes Georgina Elizabeth Whelpton and Katharine Aimee Swayne or any of them shall then be living or shall have previously died leaving issue then living such of the said sums of 4000*l.* 3000*l.* and 3000*l.* hereinbefore directed to be set apart for their benefit as shall have been so set apart for the benefit of the one or more of them so dying and her issue shall be brought into hotchpot and accounted for in the division hereby directed to be made of the net proceeds of my family estate."

The will contained a subsequent declaration "that if any of my said five cousins shall die before the aforesaid direction for

sale of my family estate shall come into operation leaving a child or children living at the time when such direction for sale shall come into operation who being male shall attain or shall have attained the age of twenty-one years or being female shall attain or shall have attained that age or shall marry or shall have married then and in every such case the last mentioned child or children shall take and if more than one equally between them the share to which his her or their parent would have been entitled for life of and in the net proceeds of sale of my family estate if such parent had not died before the direction for sale thereof had come into operation."

The above-named Katharine Aimee Swayne had died before the direction for sale came into operation leaving an only child, the infant defendant Helen Mary Swayne, and one of the questions now arising for determination in the execution of the trusts of the will was whether in the distribution of the proceeds of the family estate the defendants Frederika Ponsonby Holmes and Georgina Elizabeth Whelpton had to bring into hotchpot the sums of 4000*l.* and 3000*l.* which had been raised and set apart in trust for them respectively as in the will directed.

Hughes, K.C., and *Beaumont*, for the plaintiffs, the trustees.

Norton, K.C., and *Dighton Pollock*, for the infant defendant Helen Mary Swayne. The Court has to alter this clause in some way or other, and we submit that there is sufficient in the will to enable the Court to supply the omission by inferring that the testator meant that such of the three named ladies as were living should also bring into hotchpot the sums previously bequeathed in trust for them: *Mellor* v. *Daintree*. (1)

Harman, for the defendant Frederika Ponsonby Holmes. However ambiguous the first part of the clause may be, the second part of it is perfectly plain and can be quite well carried out in the event which has happened without supplying or inferring any words. *Mellor* v. *Daintree* (1) really turned on the word "such" and is wholly distinguishable. There is not sufficient in this will to justify the Court in supplying any words so as to alter the plain meaning of the latter part of the clause

(1) (1886) 33 Ch. D. 198.

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and compel Miss Holmes and Mrs. Whelpton to bring their trust legacies into hotchpot.

W. F. Webster (*Younger, K.C.*) with him, for the defendant Georgina Elizabeth Whelpton. There is no such irresistible impulsion in this case as to make the Court supply words.

Norton, K.C., in reply.

Fischer Williams, Chetham-Strode, and *J. M. Gover*, for other parties not interested in this question.

Cur. adv. vult.

April 14. JOYCE J. The testator in this case devised what he called the family estates upon trust to raise by mortgage the sums of 4000*l.*, 3000*l.*, and 3000*l.*, the 4000*l.* to be set apart for the benefit of his cousin the defendant Frederika Holmes, who was then a spinster and is still unmarried, one of the sums of 3000*l.* for his cousin the defendant Mrs. Whelpton, and the other sum of 3000*l.* for his cousin Mrs. Swayne, now deceased. Then subject to these charges the family estates are devised upon certain limitations (which have since determined), with an ultimate trust for sale. This, in the events which have happened, has taken effect.

The testator directed the sum to be set apart for each of the ladies I have named to be held for her for life with power to appoint a life or smaller interest to a surviving husband, and then for the lady's children or remoter issue as she should appoint, and in default for her children equally who being sons should attain the age of twenty-one or being daughters should attain the age of twenty-one or marry under that age. If the family estates should be sold the proceeds, subject to a deduction of 500*l.*, were to be held on trust for such of the testator's five cousins, the defendant Frederika Holmes (that is the lady for whom the 4000*l.* was to be set apart), Henry Holmes, Arthur Holmes, the defendant Mrs. Whelpton (the lady for whom one of the sums of 3000*l.* was to be set apart), and Mrs. Swayne (the lady for whom the other 3000*l.* was to be set apart), as should be living when the trust for sale should come into operation, in equal shares, with a hotchpot clause or proviso in reference to the aforesaid sums of 4000*l.*, 3000*l.*, and 3000*l.*, the true construction

and effect of which provision are what I have now to determine. Later in the will there is a proviso that "If any of my said five cousins shall die before the aforesaid direction for sale of my family estate shall come into operation leaving a child or children living at the time when such direction for sale shall come into operation who being male shall attain or shall have attained the age of twenty-one years or being female shall attain or shall have attained that age or shall marry or shall have married then and in every such case the last mentioned child or children shall take and if more than one equally between them the share to which his her or their parent would have been entitled for life of and in the net proceeds of sale of my family estate if such parent had not died before the direction for sale thereof had come into operation" and so on.

Returning to the provision with respect to the bringing of the 4000*l.*, 3000*l.*, and 3000*l.* into hotchpot, a priori I can see no reason why this provision should be made to apply to one of the sums more than another, nor is there any apparent reason why any of these sums should not be brought into hotchpot, whether the lady who takes a life interest therein were herself living or had died leaving a family which in her place took a share in the proceeds of sale; and in fact the clause thus commences: "But so that if the said Frederika Ponsonby Holmes Georgina Elizabeth Whelpton and Katharine Aimee Swayne or any of them shall then be living or shall have previously died leaving issue then living," and so on, apparently introducing something which is to follow or result in the case of any one or more of the three being alive as well as in the event of any one or more of the three having died leaving issue then living. In fact, however, the clause proceeds thus after the introductory words expressing the contingencies in which the clause is to operate, "such of the said sums of 4000*l.* 3000*l.* and 3000*l.* hereinbefore directed to be set apart for their benefit as shall have been so set apart for the benefit of one or more of them," not "who shall then be living or shall have previously died leaving issue then living," but only "so dying and her issue"; "so dying" meaning, or I suppose being intended to mean, "who shall have previously died leaving issue then living." Thus the latter part of the clause taken

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literally does not expressly in terms deal with or direct anything with reference to the sum or sums set apart for the benefit of the one or more of the three ladies who may be living when the trust for sale comes into operation, and this notwithstanding that one of the two events or contingencies mentioned in the first part of the clause is the contingency "if any one or more of them shall be then living."

It is not, and it could not be, denied that there has been a blunder somewhere by the draftsman, either in the introductory part of the clause, where words have been inserted which ought not to occur, or in the latter part, where words have been omitted which you would have expected to occur. Either we must reject or give no effect to some of the words in the introductory part of the clause, which, if it exactly fitted the latter part read very literally, would not purport to deal with or extend to the case of one or more of the ladies who should be then living, but only to those who should have previously died leaving issue then living, or we must construe the latter part of the clause as being intended to apply and extending to the sums set apart for any one or more of the ladies who might be living when the trust for sale came into operation.

If all three were living when the trust for sale came into operation—that is one of the events expressly contemplated—the clause ought to apply, but it does not, if taken literally, prescribe at all what is then to ensue unless we can arrive at it by construction and reading in something which is, perhaps accidentally, omitted. Am I to treat the latter part of the clause as fitting or intending to fit the introductory part, or am I in the first part to reject words as inserted in error, and reduce it to fit the latter part? I think I must either read it as providing for or directing a bringing into hotchpot in both or in each of the two contingencies mentioned, or I must altogether disregard, and in truth reject, the first contingency expressed in the introductory part of the clause. Which of these two courses am I to adopt? Now I think it is not very difficult to see how a slip or omission may have occurred in the latter part of the clause, but to my mind it is impossible to account for or explain the insertion in the earlier part of the clause of the words "shall

then be living" unless the latter portion, namely, the direction for bringing into hotchpot, was to apply in case that contingency happened.

There are various cases with regard to striking out or supplying words in wills when you cannot get at what is to be done by construction of the document itself, and I think it is settled that "the intention of the testator, which can be collected with reasonable certainty from the entire will, ... must have effect given to it, beyond, and even against, the literal sense of particular words and expressions. The intention, when legitimately proved, is competent not only to *fix* the sense of *ambiguous* words, but to *control* the sense even of *clear* words, and to *supply* the place of *express* words, in cases of difficulty or ambiguity." I am reading from Hawkins on Wills, 2nd ed. at p. 6. Then there are a number of authorities cited which are always cited in similar cases, and which I need not, I think, go through. A similar case, and the case nearest to this, is perhaps *Mellor* v. *Daintree* (1), which was cited to me, and *In re Wroe* (2), also before North J.

I observe that in the second edition of Hawkins on Wills it is stated on p. 9: "In a MS. note Mr. Hawkins adds 'See also *Langston* v. *Langston* (3) ("second, third and other sons" held to include an eldest son).'" I have referred to that case perhaps more out of curiosity than anything else. There there was a devise to trustees upon trust to convey to the use of the testator's eldest son J. H. L. for life with remainder to trustees to preserve contingent remainders; with remainder to the use of the second, third, fourth, fifth and all and every other the son and sons of the body of J. H. L., saying nothing at all about J. H. L.'s first son. There was no express limitation to J. H. L.'s first son, nor any provision made for him, nor was he referred to in the will, but certain things were made to depend upon his having no son. It was held there by the House of Lords that the first son, although it was not expressed, took an estate tail, and the first estate tail. Judgments of the Lord Chancellor, Lord Brougham, are always interesting. He says there, amongst other things (4), "My Lords,

(1) 33 Ch. D. 198.
(2) (1896) 74 L. T. 302.
(3) (1834) 2 Cl. & F. 194.
(4) Ibid. 238.

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the will contains a series of limitations: it is penned with great care; it is the production of a professional man; it is a production of great professional skill and experience; it is one of the most artificial, one of the most elaborately penned, one of the most carefully conceived instruments, which it has ever been my lot to be called upon to examine; nevertheless it does so happen, as if to confound the pride of human learning and experience in legal matters, that this production of the most practised conveyancer has as much occasion for the helping interposition of a Court of Equity or of Law before which it comes to give it effect, as if it had been penned either by an ignorant peasant, without any professional aid, or by one of those rustic artists whose partial knowledge of conveyancing—(I mean those who sometimes make wills in the country for persons a little more ignorant, and but a little more ignorant, than themselves)—and whose handywork often gives rise to much labour and to inextricable difficulties in Courts of Justice. My Lords, no person out of Court can read this instrument without being perfectly persuaded that an accident must have happened either in the framing of it originally, or in copying the draft, whereby a line or two has been left out; either the limitation, which was intended to be inserted, and which was taken for granted to have been inserted in the draft, was by some accident omitted; or that being in the draft, a couple of lines were passed over in copying the draft into the ingrossment. For instance, to show that this must be the case, the very first person that was likely to take any estate under the will after the only son of the testator in esse at the date of his will, the eldest son, is disposed of by being omitted. He is not named there at all. 'Then are you,' say the Court of King's Bench"—this had been to several Courts, who could not agree with one another—"'to give him an estate tail, or any estate at all, when he is not even named in the will? Named he is for other purposes and in other respects, but not to take anything; not to benefit under the will.'" Then there is a very amusing paragraph indeed about the anxiety of one side that the House of Lords should look at the draft and the anxiety of the other side that they should not look at the draft, whereupon Lord Brougham says: "I at once, therefore, proceeded to have a still

greater anxiety and curiosity, because I plainly saw it was likely to be a decisive matter." Well, he looked at it, and then he says: "I have no right to look at the draft, but anybody who reads this will—and that is my first reason for agreeing with the Court of Common Pleas rather than the King's Bench—anybody who reads this will cannot, if he has his senses about him, doubt that some mistake must have happened; and that is a legitimate ground in construing an instrument, because that is a reason derived not dehors the instrument, but one for which you have not to travel from the four corners of the instrument itself."

So here I am satisfied that there has been some blunder, and I hold that it is more likely to be in the latter part of the clause than in the first part. I am therefore of opinion that this provision for bringing into hotchpot applies to the case of any one or more of them who may be living as well as to those who may have died leaving issue then living who attain twenty-one or being female marry under that age. The result is that the defendants Miss Frederika Holmes and Mrs. Whelpton must bring into hotchpot their 4000*l.* and 3000*l.* respectively in the same manner as the child of Mrs. Swayne if she attains twenty-one or marries under that age is to bring into hotchpot the 3000*l.* directed to be set aside for Mrs. Swayne and her children.

Solicitors: *Tylee & Co.; Barnett & Shirer, for Gold, Edwards & Co., Denbigh; Metcalfe, Hussey & Hulbert; Ingle, Holmes, Sons & Pott; Le Brasseur & Oakley, for E. B. Haygarth, Cirencester.*

R. M.

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1913
April 7, 8, 22.

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[1912 G. 277.]

Mortgage—Equitable Charge by Deposit—Subsequent Legal Mortgage to another Incumbrancer subject to Prior Charge—No Notice to First Mortgagee—First Mortgage subsequently paid off—Title Deeds handed to Mortgagor—Title Deeds then pledged to secure Mortgagor's Banking Account—Priority.

The owner of leasehold premises charged them with the payment of certain moneys to the G. and M. Bank and deposited the lease as security. He then mortgaged the premises by sub-demise expressly subject to the bank's charge. The legal mortgagee did not give the bank notice of his mortgage. The mortgagor subsequently, without the knowledge of the legal mortgagee, paid off the G. and M. Bank, obtained the lease from them, and deposited it with the defendant bank, who had no knowledge of the legal mortgage, to secure moneys advanced by them. In an action by the executors of the legal mortgagee to establish their priority over the defendant bank:—

Held, that the legal mortgagee had not been guilty of any misconduct, negligence, or want of caution for which he could be held directly or indirectly responsible; and that nothing had happened to take away or affect his original priority.

ACTION.

In June, 1904, one George Franklin charged a leasehold house and premises held by him for a term of 1000 years from March 25, 1893, under an indenture of lease dated May 26, 1894, with the payment to Grant & Maddison's Bank of the sum of 600*l.* and interest, and deposited the lease and other documents with the bank as security.

By an indenture of mortgage dated August 20, 1894, the property comprised in the lease was demised to one John Grierson for the term created by the lease except the last day thereof by way of mortgage for securing the sums therein mentioned subject nevertheless to the above-mentioned prior charge to Grant & Maddison's Bank, and the mortgagor thereby declared himself a trustee for the mortgagee of the nominal reversion of the leasehold term.

No notice of this legal mortgage was ever given to Grant & Maddison's Bank, who continued to hold the lease.

In March, 1895, the charge to Grant & Maddison's Bank was without the knowledge of the legal mortgagee paid off in the circumstances hereinafter mentioned, and on March 29, 1895, the lease together with other deeds was deposited by George Franklin with the defendants, the National Provincial Bank of England, by way of equitable mortgage with the ordinary banker's memorandum of charge to secure certain moneys owing to the bank, who had no notice of the legal mortgage.

Interest was duly paid under the legal mortgage down to George Franklin's death in 1910, when it ceased, and then the plaintiffs, who were the executors of John Grierson, the legal mortgagee, who had died in January, 1904, discovered the existence of the defendant bank's charge and commenced this action to establish the priority of their legal mortgage and obtain delivery of the deeds.

The defendant bank alleged that the legal mortgagee himself had paid off Grant & Maddison's Bank without getting the title deeds from them or giving them notice of the legal mortgage, and had so been guilty of negligence or want of caution.

From the evidence at the trial, however, it appeared that Grant & Maddison's Bank had not been paid off by the legal mortgagee at all, but that they gave up the deeds to the mortgagor on payment by him on March 23, 1895, out of his own moneys of 600*l.* out of the 630*l.* then owing to them on their security. The payment was made in the following circumstances:—On March 23, 1895, the mortgagor handed a cheque in his own favour for 1150*l.* to the plaintiff Mr. Hugh Grierson, who was a solicitor and son of the legal mortgagee, and who had acted for his father in respect of the legal mortgage and ordinarily acted for his father when the latter required a solicitor. The mortgagor took in exchange for his cheque Mr. Hugh Grierson's own cheque for 900*l.*, leaving the balance of 250*l.* with Mr. Hugh Grierson for his father and to be applied in part discharge of the moneys due on the security of the legal mortgage. The mortgagor mentioned that he intended to pay the 900*l.* to Grant & Maddison's Bank,—300*l.*, part of it, being paid in respect of another mortgage—but Mr. Hugh Grierson did not know exactly

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how much was due to Grant & Maddison's Bank in respect of the equitable mortgage of the leasehold property comprised in his father's legal mortgage, or that the mortgagor intended to obtain the title deeds.

Ward Coldridge, K.C., and *P. F. S. Stokes*, for the plaintiffs. The plaintiffs have the legal estate, and at the date of the legal mortgage the title deeds were in the hands of Grant & Maddison's Bank, to whose charge the legal mortgage was subject. In the circumstances the onus is on the defendant bank to displace the plaintiffs' legal title: per Lord Cairns L.C. in *Shropshire Union Railways and Canal Co.* v. *Reg.* (1)

Hughes, K.C., and *H. C. Bischoff*, for the defendant bank. The question is whether upon the facts there is not sufficient evidence of negligence on the part of the legal mortgagee. The plaintiff Grierson was the solicitor of the legal mortgagee in the inception of the mortgage of August 20, 1894, and the latter left the matter entirely in his solicitor's hands and is bound by what his solicitor did. The legal mortgagee ought either himself or by his agent to have obtained the deeds from, or have given notice of his mortgage to, Grant & Maddison's Bank. The plaintiff Grierson knew that the 600*l.* was going to Grant & Maddison's Bank, and it was his business either to have obtained the deeds or given notice of the mortgage. Not having done so, the legal mortgagee is, in the circumstances, postponed, because by acting as he did he enabled the mortgagor to pledge the deeds with the defendant bank without notice of the legal mortgage. This case does not differ in principle from the case where a mortgagee lends the deeds to the mortgagor and so enables him to commit a fraud.

The principle stated by Fry L.J. in *Northern Counties of England Fire Insurance Co.* v. *Whipp* (2) to the effect that nothing but fraud will postpone the legal mortgagee has been qualified in two later cases. In *Oliver* v. *Hinton* (3) and *Walker* v. *Linom* (4) the holders of the legal estate were postponed to a prior equitable

(1) (1875) L. R. 7 H. L. 496, 506, 507.
(2) (1884) 26 Ch. D. 482, 494.
(3) [1899] 2 Ch. 264.
(4) [1907] 2 Ch. 104.

mortgagee on the ground that they had been guilty of negligence so gross as to render it unjust to deprive the prior mortgagee of his priority.

In *Walker* v. *Linom* (1) Parker J. says that in his opinion "any conduct on the part of the holder of the legal estate in relation to the deeds which would make it inequitable for him to rely on his legal estate against a prior equitable estate of which he had no notice ought also to be sufficient to postpone him to a subsequent equitable estate the creation of which has only been rendered possible by the possession of deeds which but for such conduct would have passed into the possession of the owner of the legal estate." That exactly covers this case, and the plaintiffs' mortgage ought to be postponed to the defendant bank's charge.

The legal mortgagee left all these matters in his son's hands, and if it were necessary to put this case on constructive notice, then this was "the same transaction" within the meaning of s. 3, sub-s. (ii.), of the Conveyancing Act, 1882, and the legal mortgagee is in exactly the same position as if he had conducted the business himself. He was acting all through by his son, the plaintiff Grierson, as his agent and solicitor.

Ward Coldridge, K.C., and *P. F. S. Stokes*, for the plaintiffs. The legal mortgagee never authorized or enabled the mortgagor to deal in any way with the indicia of title, and he never had any hand in the transaction or received 1150*l.* When the plaintiff Grierson took the cheque for 1150*l.* he was not acting as his father's agent, but he was merely acting as the mortgagor's banker to break up the cheque for 1150*l.*, and what the mortgagor did with the cheque for 900*l.* when he got it back was not the act or the concern of the plaintiff Grierson, who did not know that the charge in favour of Grant & Maddison's Bank was about to be discharged. It is true that he acted for the legal mortgagee when the mortgage was originally taken, but he was not the agent of the legal mortgagee throughout this business. Because a solicitor is in the habit of acting for a client, or has been employed to do something for him, he is not his solicitor to bind him by anything he says, or by receiving notices or information: per James L.J. in *Saffron Walden Second Benefit Building Society* v.

(1) [1907] 2 Ch. 114.

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Rayner (1); *Cory* v. *Eyre.* (2) The plaintiff Grierson had no power to affect his father's rights or prejudice his claim, and the latter did no act which would prejudice his legal position as mortgagee or invest the dishonest mortgagor with the indicia of title of an absolute owner to enable him to deal with the property: *Rimmer* v. *Webster.* (3)

But even if the plaintiff Grierson was his father's agent, the priority of the legal mortgage will not be postponed simply because he took no steps to guard against future fraud. He was not guilty of fraud so as to come within the principle laid down in *Northern Counties of England Fire Insurance Co.* v. *Whipp* (4), or of gross and culpable negligence so as to come within the decisions in *Oliver* v. *Hinton* (5) and *Walker* v. *Linom.* (6)

The legal mortgagee was not bound to give any notice in order to complete his security, and his omission to do so does not amount to neglect of duty for which he ought to be postponed: *Union Bank of London* v. *Kent* (7); *In re Ingham.* (8)

There is no case in the books in which, there being a good legal mortgage, the mere omission to take steps to guard against subsequent fraud on the part of the mortgagor has postponed a legal mortgagee to a subsequent incumbrancer.

Cur. adv. vult.

April 22. JOYCE J. This is a question of priorities between two mortgages, the earlier in date, that of August 20, 1894, being a legal mortgage of various properties including, inter alia, a leasehold or certain leaseholds subject to a prior equitable charge thereon in favour of Grant & Maddison's Bank, the legal mortgage being made expressly subject to such charge, and the equitable mortgagee holding, of course, the lease and other title deeds.

Notwithstanding what is stated in various books, such as Key and Elphinstone's Compendium of Precedents in Conveyancing, and all the other books, as to the necessity, or at least the

(1) (1880) 14 Ch. D. 406, 409.
(2) (1863) 1 D. J. & S. 149.
(3) [1902] 2 Ch. 163, 173.
(4) 26 Ch. D. 482.
(5) [1899] 2 Ch. 264.
(6) [1907] 2 Ch. 104.
(7) (1888) 39 Ch. D. 238.
(8) [1893] 1 Ch. 352, 360.

expediency, of a second mortgagee giving notice to a first mortgagee, no notice of the legal mortgage was in fact given to the prior equitable mortgagee holding the documents of title, although, of course, the legal mortgagee knew of the equitable mortgage, as it was expressly mentioned. Somehow or other the defendants, the National Provincial Bank of England, have now the documents of title relating to this leasehold in their possession, and they are comprised in an ordinary banker's security dated March 29, 1895, not containing or purporting to contain any conveyance or assignment of the legal estate.

The contest is between the defendant bank and the representatives of the original legal mortgagee. The theory upon which the defendant bank claimed priority was this, that, as it was alleged, the legal mortgagee had paid off Grant & Maddison's Bank without getting the title deeds from them or giving them notice of his legal mortgage, and that the mortgagor had thus obtained the title deeds from Grant & Maddison and deposited them at the defendant bank as security. The bank contended that, in the circumstances, the legal mortgagee had been guilty of such negligence or want of caution as to disentitle him in equity to insist upon priority over the bank. But when the facts came to be investigated it turned out that Grant & Maddison's Bank were not paid off by the legal mortgagee at all, but that they gave up the deeds to the mortgagor upon payment by him, out of his own money, on March 23, 1895, of the amount, or a considerable portion of the amount, nearly all I think within a few pounds, but at any rate a considerable portion of the amount due to them, and that the mortgagor then proceeded to pledge these deeds with the defendants, the National Provincial Bank of England.

It is quite true that on March 23, 1895, the mortgagor, having a cheque in his own favour for 1150*l.*, went to Mr. Hugh Grierson, a solicitor and a son of the legal mortgagee, now in fact a plaintiff in the action as one of his father's legal personal representatives, and handed to Mr. Hugh Grierson the cheque, for 1150*l.*, taking in exchange Mr. Grierson's own cheque for 900*l.*, leaving the balance with Mr. Grierson for his father, and to be applied in part discharge, or otherwise on account of, the

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father's legal mortgage. Mr. Hugh Grierson had acted for his father in respect of the legal mortgage, and was no doubt ordinarily employed as his father's solicitor whenever the father required the services of a solicitor.

I take the result of the evidence to be that on March 23, 1895, Mr. Hugh Grierson was informed by the mortgagor that he intended or was going to pay Grant & Maddison's Bank the 900*l.* for which Mr. Hugh Grierson had given his own cheque in exchange for the cheque for 1150*l.* Mr. Hugh Grierson did not know exactly how much was due to Grant & Maddison's Bank from the mortgagor, or, at all events, did not know he was going to get the title deeds from them. The 900*l.* was paid to Grant & Maddison's Bank in respect of a debt for which the mortgagor was personally liable and so, as we know, really enured for the benefit of the legal mortgagee, because a mortgagor cannot pay off a first mortgagee and then set it up against a subsequent charge which he himself has created: *Otter* v. *Lord Vaux* (1); or, as put in one of the oldest text-books, perhaps more accurately, where the owner of an equity of redemption pays off a charge which he is personally liable to pay he is not allowed to set up the charge against a subsequent incumbrancer to whom he is liable.

I am unable to understand how it can possibly be made out that in what passed on March 23, 1895, between the mortgagor and Mr. Hugh Grierson there was any misconduct or negligence or want of caution for which the legal mortgagee can be held directly or indirectly responsible. Even if Mr. Hugh Grierson could be blamed for anything he did or omitted to do in March, 1895, I do not think that his father the legal mortgagee would be affected thereby.

It must be taken as well settled, whether we like it or not, that a second mortgagee, however expedient it may be for him to give notice of his security to any prior mortgagee when he is aware of his existence, is in no way bound to do so. That is the position in law and equity, and it will not in any way be prejudiced by the omission, if it can be so called, to give such notice.

The result is that nothing has happened to take away or affect

(1) (1856) 6 D. M. & G. 638.

the original priority of the legal mortgagee, although his security has been improved by the payment made by the mortgagor in March, 1895, to Grant & Maddison's Bank. As a matter of fact if that bank originally, or on March 23, 1895, had had proper notice of the legal mortgage they would not, I suppose, have given up the deeds, and the mortgagor would never have made the payment to the bank that he did in fact make. Thus it appears that the legal mortgagee has in truth derived a considerable advantage from not giving notice of his incumbrance to the prior mortgagee, an occurrence the possibility of which has not, so far as I am aware, been noticed in any of the books.

The result is, in my opinion, that the legal mortgagee retains his priority, and there must be an appropriate declaration to that effect.

Solicitors : *Chester, Broome & Griffithes, for Lomer & Grierson, Southampton ; Lovell, Son & Pitfield, for Paris, Smith & Randall, Southampton.*

R. M.

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1913

April 22.

In re PACIFIC COAST SYNDICATE, LIMITED.

[001 of 1913.]

Company—Voluntary Liquidation—Unsuccessful Litigation—Costs—Priorities—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 193.

Costs of unsuccessful litigation incurred by a liquidator, whether in a voluntary or compulsory winding-up, are payable to the party entitled out of the assets of the company in priority to the costs of the liquidation. This rule applies whether the order simply directs payment of costs, or directs that the costs be paid out of the assets of the company, or that the liquidator do pay the costs with liberty to recoup himself out of the assets.

Adjourned Summons.

This was an application by a creditor that the liquidator of the above-named syndicate should pay certain costs under these circumstances.

The syndicate was formed in the year 1909 to promote a certain company, and for that purpose they obtained and caused to be printed various reports from experts and others. The syndicate failed to float the company and went into voluntary liquidation in October, 1911.

In December, 1911, a company called the British Columbian Fisheries, Limited, was registered, and in their prospectus printed extracts from two of the reports which the syndicate had previously printed and published in the prospectus of the company they had failed to float. Thereupon in January, 1912, an action was commenced in the King's Bench Division by Bowler and Lockyer (who had written the reports) and the syndicate against the British Columbian Fisheries, Limited, alleging that the reports were their property and that they had the copyright therein, and claiming an injunction and damages against the defendant company. The action was tried before Darling J. with a special jury on December 4, 5, and 6, 1912, and, on the findings of the jury, judgment was entered for the defendant company with costs.

Immediately after the trial the solicitors of the defendant

company wrote to the liquidator of the syndicate giving him notice not to part or otherwise deal with the assets of the syndicate in his hands or power until the defendant company's costs of the action were satisfied; and on December 23, 1912, they wrote to him that their costs had been taxed and allowed at 300*l.* 1*s.* 3*d.* and requested payment. In reply he sent them a cheque for 86*l.* 14*s.* 2*d.* and suggested that they should apply for the balance of their taxed costs to his co-plaintiffs in the action.

It appeared, however, from the liquidator's accounts that at the date of the judgment he had a balance at bank of about 500*l.*, out of which he paid some 375*l.* for costs to his solicitors in the action and a few small debts of the company. This left him a balance of 86*l.* 14*s.* 2*d.*, which he had paid to the defendant company's solicitors.

The defendant company now applied by summons in the winding-up that the liquidator might be ordered to pay them the sum of 213*l.* 7*s.* 1*d.*, being the balance of their taxed costs of the action.

Gore-Browne, K.C., and *Rankin*, for the summons. The costs incurred by a liquidator in unsuccessful litigation are payable out of the assets of the company in priority to the costs of the winding-up, and it is immaterial whether a summons or an action is simply dismissed with costs or whether the order is for the liquidator to pay the costs: *In re Home Investment Society* (1); *In re Dominion of Canada Plumbago Co.* (2); *In re London Metallurgical Co.* (3) The three plaintiffs are liable for the costs, but we can proceed against any one of them. We warned the liquidator not to part with the money.

G. M. Simmonds, for the liquidator. The authorities cited are all cases of compulsory winding up or of winding up under supervision and do not apply to a voluntary winding-up. In a winding-up by the Court execution against the company is automatically stayed by s. 211 of the Act, but that is not the case in a voluntary winding-up. There is a distinction between a compulsory and a voluntary winding-up: *Currie* v. *Consolidated Kent Collieries*

(1) (1880) 14 Ch. D. 167. (2) (1884) 27 Ch. D. 33.
(3) [1895] 1 Ch. 758.

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Corporation. (1) In a voluntary winding-up a judgment creditor can issue execution. Here the defendant company could have garnished the money at the bank and ought to have applied to the Court under s. 193 of the Act for leave to levy execution: *Ex parte Smith.* (2) The letter to the liquidator was of no effect. Under r. 187 of the Companies (Winding-up) Rules, 1909, these costs were subject to the order of the Court. Here the judgment was only for costs and did not order payment out of the assets of the company, and unless such an order is made the assets of the company are not bound. The defendant company are only entitled to an order for payment out of any assets that may come to the hands of the liquidator.

NEVILLE J. In my opinion the applicants in the present summons, the defendants in the action, who obtained judgment with costs against the Pacific Coast Syndicate, Limited, are entitled to payment of their full taxed costs of the action in priority to the liquidator's costs in the winding-up, and it seems to me that that result follows whenever after the commencement of a winding-up an action is commenced by the liquidator in the name of the company and judgment is given for costs against the company, whether the order is merely for costs, or whether it directs the costs to be paid out of the assets of the company, or whether the liquidator is ordered to pay the costs with liberty to recoup himself afterwards out of the assets of the company. In either case the party entitled to the costs is entitled to payment of them before the costs of the liquidator are paid. I do not think the question depends upon whether execution can or cannot issue against the company, and in my opinion the principle applies just as much in a voluntary winding-up as in a compulsory winding-up, for in a voluntary winding-up any creditor can now apply to the Court under s. 193 for the determination of any question arising in the winding-up. I think the present application comes within the section. Here the liquidator had moneys in his hands which would now have been applicable to the payment of the taxed costs of the applicants had he not

(1) [1906] 1 K. B. 134, 138. (2) (1867) L. R. 3 Ch. 125, 130.

applied them in payment of his own solicitors' costs which were subject to the prior claim of the applicants. I hold, therefore, that he must pay the applicants their taxed costs of the action, and he may repay himself out of any further assets that may come to his hands.

Solicitors: *Braby & Waller; Bullock & Co.*

H. L. F.

In re PREMIER UNDERWRITING ASSOCIATION, LIMITED (No. 1).

[00103 of 1909.]

Insurance Company—Company limited by Guarantee and not having its Capital divided into Shares—Winding-up—Past and Present Members—List of Contributories—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 9, *sub-s.* 4; *s.* 38—*Companies* (*Consolidation*) *Act*, 1908 (8 *Edw.* 7, *c.* 69), *s.* 123.

Sect. 38 of the Companies Act, 1862, which is reproduced in s. 123 of the Companies (Consolidation) Act, 1908, applies to all companies formed under the Act. Therefore the past members of a company limited by guarantee, as well as the past members of a company limited by shares, who have ceased to be members within a year before the commencement of the winding up of the company, are not liable to contribute to the assets of the company unless it appears to the Court that the existing members are unable to satisfy the contributions required to be made by them in pursuance of the Act.

ADJOURNED SUMMONS.

This was a representative case and raised the question whether, in the winding up of a company limited by guarantee, its past and present members were properly placed on the same list of contributories.

The Premier Underwriting Association, Limited (hereafter called the Premier Association), was incorporated in January, 1903, under the Companies Acts as a company limited by guarantee and not having a capital divided into shares. Its objects as defined by its memorandum of association were (inter alia) the insurance, whether upon the mutual or any other principle or partly on one principle and partly on another,

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against every description of marine risks which might be lawfully undertaken upon steamships of all kinds in which the members of the association as defined by the articles were interested, and the taking of re-insurances from any other association or company on any steamships. Clause 5 of the memorandum was in its terms similar to s. 9, sub-s. 4, of the Companies Act, 1862, and provided: "Every member of the association undertakes to contribute to the assets of the association in the event of the same being wound up during the time he is a member or within one year afterwards for payment of the debts and liabilities of the company contracted before the time at which he ceases to be a member, and the costs charges and expenses of winding up the same, and for the adjustment of the rights of the contributors amongst themselves, such amount as may be required, not exceeding five pounds, in respect of each policy then in force."

The material clauses of the articles of association were as follows:—

1. "'Member' means a member of the association. Words importing persons include partnership firms and corporations."

2. "The association for the purpose of registration is declared to consist of an unlimited number of members."

3. "The association shall consist of the several persons who shall for the time being be insured, or shall have entered or agreed to insure in the association steamships or other insurable interests connected therewith."

4. "Every person who insures or re-insures any steamship or steamships, or share or shares of a steamship, or other insurable interest connected therewith, in the association, shall as from the date of the commencement of such insurance be deemed to have become a member of the association; and every such person shall be deemed to have ceased to be a member so soon as he shall no longer have any steamship or share or shares of a steamship, or other insurable interest in connection therewith, under insurance in the association, but without prejudice to the rights and remedies of the association against the person so ceasing to be a member in respect of obligations incurred up to the time of his ceasing to be such member."

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The Great Britain Mutual Marine Association, Limited (hereafter called the Great Britain Association), which was incorporated in the year 1897 under the Companies Acts with objects similar to those of the Premier Association, from time to time effected re-insurances with the Premier Association on the mutual principle, entering ships already insured in the Great Britain Association in the same way as though that association was the owner of the ships, and being liable to contribution for losses.

On February 17, 1909, the Premier Association went into voluntary liquidation, and a liquidator was appointed. At the date of the liquidation the Great Britain Association was not a member of the Premier Association, all insurances effected by the Great Britain Association having expired on February 20, 1908. A final call was made by the Premier Association on June 17, 1908, in respect of the steamships entered by the Great Britain Association and was settled in account on July 15, 1908.

The liabilities of the Premier Association were considerable, and included liabilities incurred before February 20, 1908, the date when the Great Britain Association ceased to be insured in the Premier Association. In October, 1909, the liquidator forwarded to the Great Britain Association a statement shewing the members of the Premier Association divided into five classes. The second class comprised those holding mutual policies expiring between February 18, 1908, and February 17, 1909, and the Great Britain Association came within this category, and its name was on the register of members of the Premier Association.

In December, 1909, the liquidator served on the Great Britain Association a notice stating that it was included in the list of contributories of the Premier Association to the extent of 5*l.* per policy in respect of every policy in force on February 17, 1909, the date of the winding-up. This list did not purport to be a "B" list, but included both past and present members of the Premier Association without distinguishing between the two different categories.

In January, 1910, the Great Britain Association took out a summons asking that the list of contributories might be varied

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by excluding its name therefrom on the ground that, inasmuch as the Great Britain Association ceased to be a member of the Premier Association before the date of the winding-up, the liability of the Great Britain Association (if any) as a contributory was that of a past member.

This summons stood over pending the decision of a question raised by some of the contributories, and carried to the House of Lords, as to whether the liability extended to every policy in the Premier Association in force at the date of the winding-up or was confined to their own policies in that association; and in January, 1913, the House of Lords decided that the liability of the contributories extended to every policy in force at the date of the winding-up.

The summons now come on for hearing.

Peterson, K.C., and *Walters*, for the summons. The question turns on clause 5 of the memorandum of association and s. 38, sub-s. 3, of the Companies Act, 1862, which is reproduced in s. 123, sub-s. 3, of the Companies (Consolidation) Act, 1908. (1) Clause 5 is taken from s. 9, sub-s. 4, of the Act of 1862 except

(1) The Companies Act, 1862, s. 38, enacts: "In the event of a company formed under this Act being wound up, every present and past member of such company shall be liable to contribute to the assets of the company to an amount sufficient for payment of the debts and liabilities of the company, and the costs, charges, and expenses of the winding-up, and for the payment of such sums as may be required for the adjustment of the rights of the contributories amongst themselves, with the qualifications following; (that is to say)

"(1.) No past member shall be liable to contribute to the assets of the company if he has ceased to be a member for a period of one year or upwards prior to the commencement of the winding-up:

"(2.) No past member shall be liable to contribute in respect of any debt or liability of the company contracted after the time at which he ceased to be a member:

"(3.) No past member shall be liable to contribute to the assets of the company unless it appears to the Court that the existing members are unable to satisfy the contributions required to be made by them in pursuance of this Act:

"(4.) In the case of a company limited by shares, no contribution shall be required from any member exceeding the amount, if any, unpaid on the shares in respect of which he is liable as a present or past member:

"(5.) In the case of a company limited by guarantee, no con-

that it limits the contribution of each member to 5*l.* per policy. It is submitted that s. 38, sub-ss. 1, 2, and 3, manifestly apply to a company limited by guarantee as well as to a company limited by shares, and a distinction is drawn between the "A" and "B" list of contributories. Therefore a past member of a company limited by guarantee is only liable for what has happened during his membership. The section is imperative and it is not open to a company by its memorandum or articles to traverse the provisions of the section. But clause 5 of the memorandum is not really in conflict with the section. We are improperly placed on the same list as the present members. We do not object to be placed as past members on a "B" list.

Tomlin, for the liquidator. It is a short point of construction on the section. It is submitted that there is an inherent difference between a company limited by shares and a company limited by guarantee and not having its capital divided into shares. In a company limited by shares the liability of a transferor within the year is limited by the section to the amount unpaid on his shares if the existing members are unable to pay their contribution. But the position of a past member in a guarantee company is different. The capital is not divided into shares, and every one who becomes a member enters into a particular contract of contribution which holds good even if he ceases to be a member within the year. He is not in the same position as a transferor of shares because he remains liable to make contribution in the winding-up to the extent prescribed in the memorandum.

NEVILLE J. In this case it appears to me that s. 38 applies to all companies formed under the Act and is not confined to companies limited by shares, and that s. 38, sub-s. 3, is applicable as much to the case of a company limited by guarantee as it is to the case of a company limited by shares. In fact, I think it is difficult to read the section without seeing that that was the intention of the Legislature, because, having by sub-s. 3 made a

tribution shall be required from any member exceeding the amount of the undertaking entered into on his behalf by the memorandum of association: . . . . . ."

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general provision with regard to all past members of a company, it proceeds in the following sub-sections to deal with the question of liability, first, with regard to the case of a company limited by shares, and then with regard to the case of a company limited by guarantee. In my opinion, therefore, in the case of a company limited by guarantee, as well as in the case of a company limited by shares, past members who have ceased to be members during the year are not liable until the Court is satisfied that the existing members are unable to satisfy the liabilities of the company. I hold, therefore, that the name of the applicants must be excluded from the present list of contributories.

Solicitors for applicants: *Downing, Handcock & Co.*
Solicitors for liquidator: *Coward & Hawksley, Sons & Chance.*

H. L. F.

Dictum of NEVILLE, J., at p. 38, *applied. Re* WRIGHT (a Bankrupt). [1949] 2 All E.R. 605.

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In re BIRKBECK PERMANENT BENEFIT BUILDING SOCIETY.

OFFICIAL RECEIVER *v.* THE LICENSES INSURANCE CORPORATION.

[No. 00213 of 1911.]

Insurance of Mortgage owned by a Company—Condition that Policy should cease if the Interest of the Insured in the Mortgaged Property should pass from the Insured otherwise than by Operation of Law—Insured Company in Liquidation—Power of Liquidator to assign.

The exception in a prohibition of assignment or alienation of "by operation of law" extends to enable a person, such as a liquidator, to whom the property passes by operation of law with an obligation to realize it, to assign the property.

Doe v. *Bevan* (1815) 3 M. & S. 353, followed.

By an indenture of mortgage dated June 20, 1905, made between two mortgagors of the one part and the trustees of the Birkbeck Building Society of the other part, certain leasehold premises known as the Union public-house were mortgaged

by demise to the said trustees to secure 9000*l.* and interest. The mortgage deed contained a covenant by the mortgagors to pay off the principal by certain annual instalments which would complete the payment of the whole in about twenty-three years, and a covenant by the mortgagees not to call in the principal so long as these instalments were regularly paid.

On July 6, 1905, the said trustees effected a policy with the Licenses Insurance Corporation insuring the payment of the said mortgage debt at the annual premium of 45*l.* This policy defined the insured to be "the trustees for the time being of the Birkbeck Permanent Benefit Building Society," and contained a covenant by the corporation, "subject to the conditions on the back hereof," that if the insured should become entitled, under the power of sale conferred by the said mortgage deed, or otherwise, to sell the mortgaged property, and should give notice in writing to the corporation, while the policy was in force, the corporation would within six months of claim pay the principal money for the time being due under the said mortgage with any interest due as therein mentioned.

Condition 1 provided that the policy should continue in force from year to year so long as the insured should continue to pay the annual premium, but that the corporation should have power after five years to determine the insurance by giving six calendar months' notice in writing to the insured.

Condition 2 was as follows: "This policy shall cease to be in force if the whole or any part of the interest of the insured in the mortgaged property or any part thereof shall pass from the insured otherwise than by will or operation of law, unless notice thereof in writing is given to the corporation and the insurance be declared to be continued to a successor in interest by a memorandum made on the policy by or on behalf of the corporation and the expression 'the insured' herein shall include a successor in interest to whom the insurance is so declared to be or is otherwise continued."

One of the mortgagors died in 1910.

On June 20, 1911, the Birkbeck Building Society was ordered to be wound up by the Court, and the official receiver afterwards became the liquidator thereof.

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On October 17, 1911, an order was made that all property real and personal (including things in action) belonging to the society or any trustee in their behalf should vest in the official receiver by his official name.

The official receiver as such liquidator desired to dispose of and transfer the said mortgage and the benefit of the policy in order to complete the liquidation of the affairs of the society, but the corporation claimed that he could not transfer and assign the policy without their consent, which they refused to give. There was about 6500*l.* still owing on the policy, and therefore if the liquidator could not transfer the mortgage he could not call it in for fourteen years.

The official receiver took out this summons for a declaration that he was entitled in the events which had happened to assign and transfer the policy without the consent of the corporation.

P. O. Lawrence, K.C., and *J. F. W. Galbraith*, for the official receiver. Prima facie the policy of insurance is assignable, and on the true construction of the policy there is no condition that it is not to be assigned. The policy, it is expressly agreed, shall continue so long as the premium is paid. Condition 2 was not intended to give the insurance corporation power to refuse leave to assign, but only to ensure that notice should be given of any assignment. Moreover condition 2 does not apply. It is, "The policy shall cease if the interest in the premises shall pass to any one else unless by will or operation of law." The property vested in the official receiver by operation of law, and it is so vested subject to an absolute obligation on his part to dispose of it. The assignment by him to a purchaser is therefore part of the operation of law: *Doe* v. *Bevan* (1); Redman's Landlord and Tenant, 6th ed. pp. 357, 664. It could not be intended that on the passing of the property to the official receiver it should remain in him, without his being able to deal with it according to his duty. If the insurance corporation's contention were right the policy would cease on the appointment of new trustees, for on the plain construction trustees for the time being only mean the trustees at the time of the execution of the policy.

(1) 3 M. & S. 353.

Owen Thompson, for the Licenses Insurance Corporation. Condition 2 is perfectly clear. The Licenses Insurance Corporation intended to make a policy in terms usual in policies of life and fire insurance, which would give them power to refuse to insure any one except the trustees for the time being of the Birkbeck Building Society. It is quite plain that that phrase means the successive trustees. There is no reason to confine it to the trustees at the time the policy was effected. Two things were required on a transfer of the interest in the mortgage, notice to the corporation and an indorsement on the policy of their consent. There is nothing to suggest any obligation on them to give their consent.

The exception of a change by operation of law can only apply to the vesting in the official receiver. It cannot apply to the assignment by him to some one else. He may be under an obligation to assign to somebody, but the assignment to any particular person is his own act. It is not a change effected by operation of law. *Doe* v. *Bevan* (1) is not an authority for that proposition. It was decided upon the construction of the word "assigns." There is nothing in the condition to shew that the consent must be given after the assignment. It could be applied for and given before.

NEVILLE J. There is no doubt that this policy is prima facie an assignable policy, but it is said that the second of the conditions indorsed on the policy puts it in the power of the insurers to refuse consent to an assignment—in other words, that the operation of condition 2 is to make it a policy assignable only with the consent of the insurers. Now, if the parties have so contracted, effect must be given to the terms they have arranged between them. But one cannot avoid this reflection, that if that be what condition 2 intended, the parties have taken a very roundabout way of expressing their intention. It is very noticeable that, if this clause really reserves power to consent to an assignment in the sense that the policy lapses if the consent is not given, the consent can never be given till after the assignment is made. It is not a previous consent of the insurers, but you have got to

(1) 3 M. & S. 353.

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assign first, and then having done that you may be tripped up by being told by the insurers that they are not going to make the declaration referred to in that part of the conditions. It seems to me that that would be a remarkable kind of provision, and the insurers, if that is the right construction of it, could in every case say, "We are not going to tell you whether we shall consent or not; give us notice and then we will tell you whether we are going to continue the policy to the insured"—which would be an unfortunate position for both the vendor and the purchaser of the policy in the case of any assignment.

In my opinion, the construction of condition 2 (which Mr. Thompson tells me has been very carefully drawn, as to which all I say is that if that is so the care expended has been somewhat wasted) is this, that it was not intended to prevent an assignment of the policy, but was intended to ensure notice of the assignment being given to the insurers, and, further, that the terms of the notice given to the insurers should be indorsed upon the policy so as to be beyond dispute in case of necessity. In my opinion, if the policy were assigned, and notice were given to the insurers, and the policy produced for indorsement, it would be the duty of the insurers to indorse it, a duty which would be enforced if they refused to perform it.

There is another point of view which I think equally affects the condition of the insured, and it is this. *Doe* v. *Bevan* (1) clearly shews that prima facie a contractual restriction of assignment does not apply to the assignment by a person on whom the property has devolved by operation of law, and who is under an obligation to assign. Of course, you may have so contracted as to include such a case, but the mere condition against assignment does not prima facie include it. And that this condition was not intended to include it is I think to be found not only from the general construction which ought to be placed upon such a condition, but also from the fact that we have in the conditions a direct elimination of the case of the passing of a policy by operation of law. I do not think, therefore, it was ever intended to apply to an assignment by a person in whom

(1) 3 M. & S. 353.

the policy became vested, not by a voluntary act of the insured but by the operation of law, and who then was under an obligation to assign to somebody else. I do not think it was intended in any case, even if I am wrong in the construction of the rest of the clause, that the insurers should be in a position to say "We will not give our consent." I think, therefore, that this policy can be assigned, and the official receiver is entitled to the declaration asked for.

Solicitors: *Rubinstein, Nash & Co.; Dawes & Sons.*

J. R. B.

EASTWOOD *v.* ASHTON.

[1912 C. 526.]

Vendor and Purchaser—Condition negativing Compensation—Conveyance—Parcels — Plan — Falsa demonstratio — Implied Covenants for Title—Omission to prevent Acquisition of Title under Statute of Limitations—Liability of Vendor—Measure of Damages—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 7, *sub-s.* 1 (*A*).

In 1911 the vendor as beneficial owner conveyed to the purchaser a farm with the messuage, closes, or parcels of land belonging thereto, called Bank Hey Farm, containing 84 a. 3 r. 4 p., or thereabouts, and in the occupation as to part thereof by T. H. and as to the remainder thereof by C. W. C., all which said premises were more particularly described in the plan indorsed thereon and coloured red. The plan included a small strip of land some 100 feet long by 36 feet wide which had formerly formed part of Bank Hey Farm, but as to which it was admitted for the purposes of this action that at the date of the conveyance an adverse title under the Statute of Limitations had been acquired by adjoining owners, and in the view the Court took of the evidence the acts of the adjoining owners had been brought to the notice of the vendor, who became entitled in possession to the property in 1900 under the will of a testator who died in 1883. Condition 14 of the conditions of sale under which the vendor sold provided that any incorrect statement in the particulars was not to annul the sale, nor was the vendor or purchaser to be allowed compensation in respect thereof. In an action by the purchaser to recover damages from the vendor under the covenants for title implied by the vendor conveying this strip of land as beneficial owner:—

Held, that the inclusion of the strip on the plan could not be rejected

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as falsa demonstratio and must prevail, and that the strip of land was included in the parcels conveyed.

Held, also, that condition 14 did not, after the execution of the conveyance, prevent the purchaser from recovering damages against the vendor under the covenants for title implied by the vendor conveying as beneficial owner in any case to which such covenants were applicable.

Bos v. *Helsham* (1866) L. R. 2 Ex. 72, distinguished.

Held, also, that the omission under the circumstances to prevent the adjoining owners from acquiring or completing the acquisition of a title under the Statute of Limitations constituted a thing "omitted or knowingly suffered" on the part of the vendor within the meaning of the implied covenant for right to convey, and that it was immaterial that the vendor was under no duty to any one at the time to prevent it.

Held, also, that the measure of damages was not the difference in price which would have been obtained at the sale if the disputed strip had not been included in the lot sold, but the difference in value of the land as purporting to be conveyed and the land as it actually passed to the purchaser.

Turner v. *Moon* [1901] 2 Ch. 825, followed.

TRIAL OF ACTION WITH WITNESSES.

This was an action in which the plaintiff by his statement of claim claimed damages from the defendant for breach of his implied covenants for good right to convey, for quiet enjoyment and for further assurance, in conveying as beneficial owner a small strip of land, some 100 feet long by 36 feet wide, included in lot 4, consisting of some 84 a. 3 r. 4 p., sold by auction in 1911.

The facts were stated in his Lordship's written judgment as follows: On May 4, 1911, the defendant put up for sale by public auction certain freehold properties near Blackburn in lots in accordance with particulars and conditions of sale. The description of lot 4 in the particulars was: "Lot 4 (coloured pink on plan No. 1) Bank Hey Farm. Valuable dairy holding occupying an important position with considerable frontages to Bank Hey Lane and new roads adjacent to Whalley New Road and estimated to contain an area of 84 acres 3 roods 4 perches." It also stated that the land was all good pasture and from its situation would give a purchaser an easy opportunity for development. The area coloured pink on plan No. 1 was an area or several areas of land of a highly irregular shape and included a strip of land (hereinafter referred to as the disputed strip) some 36 feet wide from east to

west, and something like 100 feet in length from north to south, which was shewn as abutting to the north on Clarendon Road, to the west on the embankment of a line of railway of the Lancashire and Yorkshire Railway Company, and to the east on some houses coloured blue on plan No. 1, which were described thereon as lot 12a, and in respect of which the interest offered for sale was merely a chief rent of 16*l.* 8*s.* 10*d.* per annum. The plan shews some physical division between the disputed strip and the rest of lot 4 to the south thereof, but the line indicating that division is crossed by the usual surveyor's hyphen mark indicating that this area forms part of a larger area, the acreage of which is stated on the plan. There is also on the plan a note that it is reproduced from the ordnance survey map and is intended only for the purpose of indicating the position of the property, and that although believed to be correct its accuracy is not guaranteed and it is not to be deemed to form part of the contract. Amongst the conditions of sale was a condition No. 14, to the effect that the several lands were believed to be and were to be taken as correctly described, and any incorrect statement, error, or omission found in the particulars or conditions was not to annul the sale or entitle any purchaser to be discharged from his purchase, nor was the vendor or any purchaser to claim or be allowed compensation in respect thereof.

At the auction lot 4 was purchased by one Albert Ball for 4700*l.*, and he shortly afterwards resold to the plaintiff for 5000*l.* By the conveyance in question, dated June 28, 1911, after various recitals shewing the title of the defendant, and after a recital to the effect that the hereditaments intended to be thereby assured described as lot 4 had been put up for sale by public auction and purchased by Albert Ball and resold by him to the plaintiff, it was witnessed that the defendant as beneficial owner at the request of Albert Ball conveyed and the said Albert Ball as beneficial owner conveyed and confirmed unto the plaintiff "All that farm with the messuage tenement or farm-house barns stables out-houses closes or parcels of land belonging thereto called Bank Hey Farm situate in the parish of Blackburn in the county of Lancaster containing 84 acres 3 roods 4 perches or thereabouts and in the occupation as to part thereof

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by Thomas Haydock as yearly tenant thereof and as to the remainder thereof by Charles William Cartman as half-yearly tenant thereof all which said premises are more particularly described in the plan endorsed on these presents and are coloured red in such plan." The plan on the conveyance is substantially a reproduction of the plan annexed to the particulars and conditions of sale so far as regards lot 4, but omits certain details including the hyphen mark to which I have referred. The whole of the land including the disputed strip is coloured red on this plan.

On March 11, 1912, the plaintiff entered into an agreement of that date with certain persons (hereinafter referred to as the mill owners) for the sale to them of part of lot 4 including the disputed strip for the purposes of the erection of a mill or shed for weaving purposes. The consideration for the sale was a perpetual yearly rent-charge of 48*l*. The disputed strip was intended to be used for the purposes of access to the mill site from Clarendon Road and is obviously the natural means of access to that site. When the mill owners came to have their site surveyed for the purposes of the erection of their mill they discovered that the disputed strip of land was divided longitudinally from north to south by a railway sleeper fence and was in fact in adverse occupation as to the western part adjoining the railway embankment by the Blackburn Corporation as the tenants of the Lancashire and Yorkshire Railway Company and as to the eastern part by the owners of lot 12a, who were the successors in title of grantees from a predecessor in title of the defendant. It was accordingly impossible for the mill owners to obtain access over the disputed strip, at any rate, without difficult and costly litigation. Accordingly the plaintiff, being unwilling to lose the mill owners as purchasers, made substituted arrangements with them under which he provided them with an access to the mill site from Clarendon Road a little further to the east. For that purpose he purchased both the freehold and the chief rent interest in lot 12a, resold by auction to other persons so much of that lot as was not required for the purpose of the new access, and managed to obtain from the mill owners an increased chief rent for the mill site with

the altered access. The net result of these transactions was a loss to the purchaser of 215*l.* 16*s.* 8*d.* in addition to a sum of 100*l.* which was agreed between the parties during the course of the action as a reasonable amount to be allowed for costs; and it is the total sum of 315*l.* 16*s.* 8*d.*, consisting of those two items, that the plaintiff is now seeking to recover from the defendant.

As regards the prior history of the land which became material for the purpose of considering whether or not there had been a breach of any covenant by the defendant, his Lordship further stated the facts as follows: It appears that in the year 1870 a Mr. William Thomas Carr, under whose will the defendant took directly and who is accordingly a predecessor in title of the defendant, as between whom and the defendant the claim of liability under the statute was not broken by any intervening purchase for value, conveyed to the Lancashire and Yorkshire Railway Company the land on which the railway embankment and the line have been constructed. A great deal of evidence was given before me on the question whether that conveyance in fact included the western half of the disputed strip or the greater part thereof. That question is an extremely difficult one, but on the whole I accept the evidence of Mr. Gregson on this point as substantially correct. The method which he adopted of enlarging the plan on the conveyance to the size of the ordnance survey and of superimposing a tracing of this enlarged plan on the ordnance survey seems to me on the whole a satisfactory method, and it resulted in a number of coincidences, such as the coincidence of a whole length of the Whalley New Road on both plans and the coincidence of the western boundary of the railway company's property on both plans, which can hardly be explained by chance. I am reasonably satisfied also that the two datum points which he took for the purposes of his enlargement are reasonably accurate points for the purpose. Further, the arrangements which were made as to a road on the dealing with lot 12a in the year 1882 as hereinafter mentioned are hardly explicable if the boundary of the railway company were as much to the east as it now is. And lastly, there is the very important fact that the boundary ascertained by Mr. Gregson's method

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coincides in general and with certain variations easily explicable by the small errors necessarily incident to a process of this kind with the remains of a quickset hedge on the east of the embankment which might very well indicate the original boundary of the railway company's land. It is common knowledge that railway companies were accustomed to fence off their land with a post and rail fence on the extreme boundary and a quickset hedge some four feet within that fence, and no other satisfactory explanation was suggested to me as to the existence of the quickset fence in the position it now occupies. In one place, however, near the south-eastern abutment of the skew bridge carrying the railway over the diversion of the Whalley New Road and quite close to the northern end of the disputed strip of land the quickset hedge in question comes right up to the southern abutment of the bridge. At this point there was undoubtedly left open to the road or the adjoining land a small triangular piece of land which had been conveyed to the railway company, and the knowledge of the railway company's staff of this fact may perhaps explain the subsequent steps that were taken to rectify the railway company's boundary. From the year 1850 onwards until the events shortly to be stated the disputed strip of land appears to have been occupied as part of Bank Hey Farm up to the boundary of the railway company's property, that is, the post and rail fence or the quickset hedge, and it may be that during this period a title by the statute was acquired against the railway company to the four feet or so of land lying outside the quickset fence. But no positive evidence has been given on this point, and there may, on the other hand, well have been sufficient user on the part of the railway company to prevent the operation of the statute. In the year 1893 or 1894 the railway company appear to have recognized that in some part at least their physical boundary was within the true boundary of the land conveyed to them, and they through their surveyor, Mr. Chew, caused a boundary stone to be put on the southern side of Clarendon Road some 35 feet from the southern abutment of the railway bridge. In so doing I think that a claim was made to include in the railway company's property a substantial breadth of land which in fact belonged to the predecessor in title of

the defendant, and the existence of this boundary stone at this spot may account for the adjustment arrived at in 1903 or 1904. In one or other of those years Mr. Chew, the surveyor of the railway company, met Mr. Perfect, the agent (for some purposes at any rate) of the defendant, and arranged that a straight line running south from the boundary stone placed in 1893 should be taken as the boundary between the land of the railway company and the land of the defendant. In arranging this straight line I have no doubt that both surveyors only intended to arrive at a give and take line which should be more beneficial to each party than the slightly irregular line which was shewn on the conveyance of 1850 and did not intend to alter substantially the area of the railway company's land or of the defendant's land. But in the result I think that the railway company did in fact obtain a recognition of their title to a substantial breadth of land not included in their conveyance. The boundary so arrived at was marked by a substantial sleeper fence. Some discussion took place in the course of the argument as to the nature of the agency of Mr. Perfect (who was alleged only to be an agent to collect rents for the defendant) and as to his power to conclusively bind the defendant by an ascertainment of boundaries. As regards this I think that Mr. Grant was right in urging that the onus of proving sufficient agency in Mr. Perfect to absolutely bind the defendant rested on the plaintiff and had not been discharged. But, on the other hand, apart from power to make a bargain the general rule is that the knowledge of an agent is the knowledge of his principal; and here it has been put forward by the defendant that the sale plan was prepared, and mistakenly prepared, by Mr. Perfect before his death. Accordingly knowledge of what was done as regards the boundary in 1903 must in my judgment be imputed to the defendant.

The facts as regards the eastern half of the disputed strip are simpler. In the year 1882 Mr. William Thomas Carr demised the land shewn on lot 12a on the sale plan to one Chadwick for a term of 999 years for building purposes. The plan on this lease shewed what was substantially the disputed strip as an intended street lying between the land demised on the east and

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the railway on the west; and the lease contained a covenant by the lessee to leave open and unbuilt on as a footpath a strip of land two and a half yards in width along the west side of the land demised, and also a covenant to make up the intended street to the extent of one half of its width. The intended street was not in fact made up, and Chadwick appears to have occupied the whole or the greater part of the land between this plot and the railway in connection with his business as a builder, though until the erection of the sleeper fence in the year 1903 or 1904 it was physically possible to get from the land to the south of the disputed strip to the Whalley New Road to the north between Chadwick's occupation and the railway embankment. But as from the erection of the sleeper fence, at any rate, the whole of the disputed strip to the east thereof was exclusively occupied by Chadwick or his successors in title.

Romer, *K.C.*, and *T. T. Methold*, for the plaintiff. The defendant has purported to convey this strip to us. The general words of the conveyance are sufficient to include it, and it is clearly indicated on the plan both on the conveyance and particulars. The plan cannot be rejected as falsa demonstratio. The decision of the Irish Exchequer Chamber in *Roe* v. *Lidwell* (1), even if correct, does not lay down any general principle applicable to the present case. It is, moreover, inconsistent with *Rorke* v. *Errington*. (2) [They also referred to *Cowen* v. *Truefitt, Ld.* (3); Norton on Deeds, pp. 218, 227.]

The strip, therefore, being included in the parcels conveyed, on the admissions and facts in evidence the vendor is liable for a breach of the implied covenant of right to convey. The case is not affected by condition 14 of the conditions of sale which is merged in the conveyance.

[SARGANT J. referred to *Page* v. *Midland Ry. Co.* (4)]

That case is in our favour as to the liability under the covenants for title; it was followed by Farwell J. in *May* v. *Platt*. (5) The covenants implied in a case like this are set out

(1) (1860) 11 Ir. C. L. Rep. 320.
(2) (1859) 7 H. L. C. 617.
(3) [1899] 2 Ch. 309.
(4) [1894] 1 Ch. 11.
(5) [1900] 1 Ch. 616.

in s. 7, sub-s. 1 (A), of the Conveyancing Act, 1881. An omission, within the meaning of the implied covenant that the grantor has full power to convey, takes place where a landowner does not turn out a trespasser but allows him to acquire a title under the Statute of Limitations. He has "omitted or knowingly suffered" something which affects his right to convey. In *David* v. *Sabin* (1) Lindley L.J. stated the effect of the implied covenants for title in a conveyance for valuable consideration by a person expressed to convey as beneficial owner.

The true measure of damages is the difference between the value of the property as purported to be conveyed and that which the vendor had power to convey: *Turner* v. *Moon* (2); and the plaintiff claims the expenses actually incurred by him in the course which he adopted under the circumstances.

A. Grant, K.C., and *G. B. Rashleigh*, for the defendant. First, on the true construction of the deed of conveyance the disputed strip is not included in the parcels. The description of the land conveyed as Bank Hey Farm, the quantity, 84 acres 3 roods and 4 perches, and the occupation by Thomas Haydock and C. W. Cartman give a clear definition of the property conveyed which is sufficiently and accurately satisfied without including the disputed strip coloured red on the plan, which was not then occupied as part of Bank Hey Farm; under these circumstances the inclusion of this strip on the plan ought to be rejected as a falsa demonstratio merely: Norton on Deeds, p. 215; *Llewellyn* v. *Earl of Jersey* (3); *Dublin and Kingstown Ry. Co.* v. *Bradford* (4); *Roe* v. *Lidwell* (5); *Horne* v. *Struben* (6); *Rorke* v. *Errington.* (7)

Secondly, clause 14 of the conditions of sale excluding the right to compensation is a continuing term of the contract for sale which enures for the benefit of the vendor and prevents the purchaser from claiming compensation after conveyance notwithstanding the implied covenants for title: *Bos* v. *Helsham* (8);

(1) [1893] 1 Ch. 523, 531.
(2) [1901] 2 Ch. 825.
(3) (1843) 11 M. & W. 183, 189.
(4) (1857) 7 Ir. C. L. Rep. 57, 63.
(5) 11 Ir. C. L. Rep. 320.
(6) [1902] A. C. 454.
(7) 7 H. L. C. 617, 625.
(8) L. R. 2 Ex. 72.

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In re Turner and Skelton (1); *Palmer* v. *Johnson*. (2) [They also cited *May* v. *Platt* (3) and *Stait* v. *Fenner* (4) on the question of rectification.]

Thirdly, the case is not within any of the implied covenants for title under s. 7, sub-s. 1 (A), of the Conveyancing Act, 1881. These covenants throughout are governed by the preliminary words "notwithstanding anything by the person who so conveys, or any one through whom he derives title, otherwise than by purchase for value, made, done, executed, or omitted or knowingly suffered": *David* v. *Sabin*. (5) The burthen is on the purchaser, therefore, to shew that the vendor has "made, done, executed, or omitted, or knowingly suffered" something which prevented him from conveying the disputed strip. The case is not within any of these expressions. If the vendor had never had any title at all it could not be contended that he would be liable under these limited covenants. The present case is certainly not within the words "made, done," or "executed." Nor does the word "omitted" apply. Omission in this connection means the omission of something in respect of the title which the owner is under a duty to do—something in the nature of a legal obligation: *Cohen* v. *Tannar* (6); *Stanley* v. *Hayes*. (7) The words "knowingly suffered" carry it no further: *Hobson* v. *Middleton*. (8) The terminology of these covenants is very old and that expression may have had reference originally to a common recovery. The words do not deal with the physical aspect of the land such as the omission to eject a trespasser or prevent the erection of a telegraph post, but are directed to the completion of the owner's title: for instance, a tenant in tail might have "omitted" to disentail and be liable accordingly.

Fourthly, in any case the true measure of damages is the difference in price which would have been given for lot 4 if the disputed strip had not been included in it, and that difference according to the evidence is trifling. The land was sold as a farm, not as a mill site.

(1) (1879) 13 Ch. D. 130.
(2) (1884) 13 Q. B. D. 351.
(3) [1900] 1 Ch. 616.
(4) [1912] 2 Ch. 504.
(5) [1893] 1 Ch. 523.
(6) [1900] 2 Q. B. 609.
(7) (1842) 3 Q. B. 105.
(8) (1827) 6 B. & C. 295.

Romer, K.C., in reply, referred in addition to *Stock* v. *Meakin* (1) and *Roffey* v. *Bent*. (2)

Cur. adv. vult.

April 14. SARGANT J. delivered the following written judgment:—In this action the plaintiff sues the defendant for damages for breach of the covenants for title contained in an indenture of conveyance, dated June 28, 1911, and made between the defendant of the first part, Albert Ball of the second part, and the plaintiff of the third part.

The material facts are as follows: [His Lordship stated the facts leading up to the action as above set out, and proceeded:]

One of the defences raised by the pleadings in the action was knowledge on the part of the plaintiff and Albert Ball or one of them at the time of the sale of the fact that the disputed strip was not any part of the Bank Hey Farm and was in fact occupied adversely to the defendant. But after the evidence given by the plaintiff and Mr. Ball this defence was, very properly, abandoned. Apart from this defence the defences were in fact three in number, namely, first, that on the true construction of the conveyance to the plaintiff the disputed strip of land formed no part of the premises conveyed; secondly, that even if this were not so the disputed strip of land had been included in the land on the particulars and on the conveyance to the plaintiff by a mistake of the defendant's agents, and that the 14th condition of sale was a continuing condition which prevented the plaintiff either in the interval between the contract and the conveyance or after the date of the conveyance from recovering in respect of an error of the kind; and, thirdly, that on the true construction of the covenants imported into the conveyance by reason of the defendant being expressed to convey as beneficial owner there had been no such act or omission as to impose any liability on the defendant. I will deal with these three defences in the order in which I have mentioned them.

As regards the construction of the conveyance I do not feel any real doubt. The description by acreage is, and is obviously intended to be, fairly loose and general and cannot properly

(1) [1900] 1 Ch. 683. (2) (1867) L. R. 3 Eq. 759.

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be resorted to for the purpose of determining whether so small an area as the disputed strip was or was not intended to be included; and accordingly there are only three kinds or elements of description left to be considered, namely, (1.) the name of the farm, (2.) the occupation, and (3.) the plan. As regards (1.) the disputed strip undoubtedly formed part of Bank Hey Farm at one time; and though, as will appear hereafter, it had ceased for some time to be occupied with the rest of the farm, there would be little impropriety in including it under the old general name; indeed this was obviously done with regard to the much larger holding of Mr. Cartman. As regards (2.) the statement as to occupation was wrong, but wrong only by virtue of the title that had gradually been acquired by other persons by adverse possession; and as regards (3.) the disputed strip is plainly and clearly included without any doubt or question whatever. In this state of things I think that the description by plan must prevail. Not only is it the most definite and certain, but in the case of land of this kind it seems to me far the most important. There may be some cases in which name or occupation may be the important elements, but this is not one of them. It is difficult to suppose that land of this kind could be sold to advantage except by reference to the plan. If the conveyance alone had to be considered I should come to the conclusion that the description by the plan constituted the most vital and essential portion of the description, and that the disputed strip was comprised in the parcels. But in view of the ambiguity in the parcels it is permissible to refer to the recitals in the conveyance, and so to ascertain what lot 4 consists of by reference to the particulars of sale. And when this is done there are several indications which assist the conclusion arrived at on the consideration of the conveyance alone.

The second defence, namely, that founded on the 14th condition of sale, must also, in my opinion, fail. In the first place I doubt whether the condition applies at all to a case such as this where the land is accurately shewn on a plan and the vendor meant to sell it and the error is due only to the forgetfulness of the vendor or his agent that the interests of other persons had intervened. But apart from this the plaintiff

is claiming by words expressly introduced into the conveyance by the Conveyancing Act, 1881. If those words by themselves do on their true construction render the defendant liable I do not see how that liability can be negatived or varied by the 14th condition of sale. Cases such as *Bos* v. *Helsham* (1), and other cases of the kind, have been referred to as shewing that a condition for compensation in a contract may continue to exist notwithstanding the execution of a subsequent conveyance containing no continuation of that condition. But it would be an entirely different thing to hold that a condition negativing compensation should, after the execution of the conveyance, negative or restrict the express language of covenants under which damages practically equivalent to compensation might in some cases, and some cases only, be recovered. The mere statement of such a contention is in my judgment sufficient to dispose of it. It follows that the defendant could not succeed in a defence based on this condition of sale except by counter-claiming (on the ground, I suppose, of common mistake) for the rectification of the conveyance by the insertion of words limiting the effect of the statutory covenants for title; and some suggestion was made to me in the course of the trial that I should allow an amendment of the pleadings so as to raise such a counter-claim. To do so, however, would have been to allow the raising of an entirely new case and to necessitate the taking of fresh evidence, and accordingly I declined to accede to the suggestion, and none the less because there are obviously many serious difficulties in the way of the success of any such counter-claim. Indeed I am inclined to think that, even if the defect in title here had been discovered between the contract and the conveyance, and it had accordingly been recognized that the introduction of the statutory covenants for title might give the purchaser a right to damages equivalent to compensation for loss of the disputed strip, the purchaser would in a specific performance action have been held entitled to a conveyance of the property described in the particulars in such a form as to give him the benefit of the statutory covenants; though I recognize that there might be cases in which the result thus

(1) L. R. 2 Ex. 72.

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arrived at would work such hardship and be so contrary to the real intention of the vendor that the Court would decline to give full effect to the contract by way of specific performance.

It is now necessary to state the prior history of the land for the purpose of dealing with the last of the defences to which I have referred. [His Lordship stated the facts relating to this part of the case as above set out, and proceeded:] In this state of circumstances the defendant has by his defence admitted for the purposes of the action that at the date of the conveyance to the plaintiff the defendant had no title to the disputed strip. And since it is part of the common case of both parties that the disputed strip originally belonged to the defendant and his predecessors in title, and no alternative method of losing title has been suggested, except in the case of the western half under the conveyance to the railway company, I must take it that the admission is at least that a title under the statute has been acquired adversely to the defendant by the railway company and the lessees of lot 12a respectively.

This seems the view of the admission which is most favourable to the defendant. For as regards the part lost to the railway company (and the loss of this part alone would I think have caused the whole damage suffered by the plaintiff), the hypothesis either of this part having been conveyed to the railway company, or of there having been a legally binding agreement of the nature of an exchange in 1903, would obviously be fatal to the defendant, since either of these hypotheses would clearly involve something "done" by the defendant or his testator. Some doubt was indeed cast by Mr. Grant both on the truth of the admission and on the expediency of making it. With neither question am I strictly concerned at the present time. It will still be open to the defendant to take steps to assert any title he may really have against the railway company, or possibly even against those now claiming under Mrs. Lamonby, the successor in title of Chadwick; and as regards expediency, I can see many reasons which might well induce the defendant to make such an admission, even if there might be some doubt of its correctness; for not only might the cost and complication of the proceedings have been much increased by the refusal to make such an admission, but the

result might possibly have been to change the effective claim from one under the covenant for right to convey to one under that for quiet enjoyment, since even if the railway company had not acquired an absolute title by the statute they might well by virtue of what took place in 1903 have acquired an inchoate title preventing entry on the land by the purchaser, and so practically causing damage equivalent or nearly equivalent to that actually sustained.

The next question now arises whether, "notwithstanding anything by the defendant or any one through whom he derives title, otherwise than by purchase for value, made, done, executed, or omitted, or knowingly suffered," the defendant had not full power to convey the disputed strip to the plaintiff; and this is the main point of law which has been argued before me. The predecessors in title of the defendant who have to be considered are, first, the testator, who died in the year 1883, and, secondly, a tenant for life under his will named Thomas Henry Ashton, who succeeded the testator and died in the year 1900, when the defendant became entitled in possession. It is clear that, putting aside the conveyance to the railway company, as to which I have already expressed my views, there was no act or default on the part of the testator which has caused any loss. As regards Thomas Henry Ashton, I do not think that there is enough to shew that in his lifetime a title adverse even to him was acquired either by the railway company or by Chadwick, and, further, not only was he not a person through whom the defendant claims, but the defendant had of course an opportunity of asserting his title when his estate came into possession; and accordingly all that is left to be considered are the acts or defaults of the defendant himself. These, so far as material, are, first, the omitting to prevent Chadwick and his successors in title on the one side and the Lancashire and Yorkshire Railway Company on the other side from acquiring or completing the acquisition of a title under the statute; and, secondly, the allowing or suffering the Lancashire and Yorkshire Railway Company to put up and maintain the sleeper fence through the middle of the disputed strip. Do these constitute things done or omitted or knowingly suffered within the meaning of the statutory covenants? In my

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opinion they do constitute things "omitted or knowingly suffered." As regards the word "omitted," a failure to eject a trespasser who is gradually acquiring a title by possession is, according to the ordinary use of language, an omission of the clearest kind, and an omission by which title is prejudiced and power to convey is ultimately lost. It was indeed argued that mere passivity is not omission, and *Cohen* v. *Tannar* (1) and *Stanley* v. *Hayes* (2) were cited in support of this view; but when examined, these cases are found to deal with the meaning of an altogether different word "interruption" in a different covenant for title. And I am equally unable to accept the argument that there can be no omission unless the failure is to do something which there is a duty to do, for this additional qualification seems to me of importance only where a claim is being made apart from express contract. Here the covenant is against an omission (amongst other things), and the question of presence or absence of duty seems to me entirely immaterial. As regards the words "knowingly suffered," I am equally clear that in allowing the sleeper fence to be erected and maintained from the year 1903 onwards the defendant "suffered," and by virtue of the knowledge of his agent "knowingly suffered," something to continue by which his title and power to convey were lost; and indeed the knowledge of the defendant does not rest solely on the knowledge of his agent, Mr. Perfect, in or about the year 1903; for in the course of the discussion of a question which arose between the railway company and Chadwick in the year 1905 it is clear that it was brought home to the defendant, through his legal advisers, that the boundaries of the railway company and Chadwick adjoined at the north of the disputed strip, even if some small part of the disputed strip had not, as was then asserted, both been conveyed to the railway company and leased to Chadwick. Accordingly on both grounds I hold the defendant liable to the plaintiff in damages.

The only remaining question is the true measure of damages. It was argued before me that the true measure was the difference in price which would have been obtained at the sale had the disputed strip been omitted from lot 4; and it was said that

(1) [1900] 2 Q. B. 609. (2) 3 Q. B. 105.

this would have been quite insignificant. But I cannot accept this view of the law; it is in my judgment well settled that the true measure of damages is the difference in value between the land as purporting to be conveyed and the land as it actually passes to the purchaser: *Turner* v. *Moon*. (1) As to this difference in value the defendant did not give any definite evidence. His witnesses rather vaguely suggested that the part of lot 4 near the disputed strip might have been developed with as good or almost as good results from the eastern or south-eastern side or through the east end of Clarendon Road. For various reasons, such as differences of level, the nature of the arches under the railway, and so on, into which it is not necessary to go in detail, I am unable to accept this view. It seems to me that the plaintiff, like a sensible man, set to work to diminish his loss as far as possible, and that he succeeded in doing so by the course he adopted. Had he remained passive I think that his loss would have been considerably larger than the amount he now claims.

Accordingly I give judgment for the plaintiff for the amount of the damages claimed by him, namely, 315*l*. 16*s*. 8*d*., and for the costs of the action.

Solicitors: *Rawle, Johnstone & Co., for Wilson, Eastwood & Ramsbottom, Blackburn; Witham, Roskell, Munster & Weld.*

(1) [1901] 2 Ch. 825.

A. C.

FARWELL L.J. (SITTING AS AN ADDITIONAL JUDGE OF THE CHANCERY DIVISION.)

1913

Feb. 8.

In re WHITEHEAD.

WHITEHEAD *v.* STREET.

[1912 W. 2995.]

Administration—Will—Legacy on Release of Annuity under a Settlement—Deficiency of Assets—Abatement.

W. by settlements declared that moneys paid by him to the trustees of an orphanage should be held by them upon trust for investment and to pay 5 per cent. per annum on the invested capital to him for life, and after his death to his maid-servant S. for life, and after the death of the survivor, upon trust to pay the capital and the income to the treasurer for the time being of the orphanage. By his will, W. gave 100*l.* to S. on condition that she released the trustees from all claims to income under the settlement and accepted the legacy in place thereof. The estate of the testator was insufficient to pay all the legacies thereby given in full:—

Held, that if S. elected to take the legacy it would abate with the other legacies and not be entitled to priority over them.

Observations on *Davies* v. *Bush* (1831) You. 341, and *In re Wedmore* [1907] 2 Ch. 277.

By an indenture dated August 21, 1899, and made between the testator of the one part and certain persons thereinafter called "the trustees" of the other part, after recitals shewing that the trustees were the trustees of an orphanage, and stating that the testator, in order to provide for the maintenance of himself, and after his death of his maid-servant, Annie Eliza Street (then Annie Eliza Barnett), and also in order to assist in the permanent maintenance of the orphanage, had paid 700*l.* to the trustees, It was witnessed, agreed and declared that the trustees should stand possessed of 700*l.* upon trust to invest the same, and by quarterly payments on the usual quarter days should pay to the testator during his life 5*l.* per cent. per annum on such invested capital as aforesaid, and after his decease should pay to A. E. Street, if she should survive him, 5*l.* per cent. per annum on the invested capital during her life, and after the death of the survivor of them, the testator and A. E. Street, should pay the invested capital and the income thereof to the treasurer for the time being of the

orphanage, to be applied in the same way as legacies were then or might be for the time being applied. And it was also declared that the trustees should on every quarter day pay any surplus income there might be, after payment of interest as aforesaid, to the said treasurer for the time being to be applied by him in manner aforesaid. By a deed dated October 23, 1903, a further sum of 300*l.* was settled by the testator upon the same trusts.

The testator died on August 5, 1911, having by his will given to A. E. Street 1000*l.* on condition that she released the trustees of the fund which he had invested for the ultimate benefit of the orphanage from all claims by her to income from such fund, and accepted that legacy in place thereof.

The total value of the pecuniary legacies given by the will exceeded the value of the total net estate, and the pecuniary legacies could not be paid in full.

The executors of the testator took out an originating summons to which A. E. Street and another pecuniary legatee were defendants for the determination of the question whether, in the event of A. E. Street electing to take the legacy of 1000*l.* on the conditions stated in the will, the said legacy, in case the estate should be insufficient to pay the legacies in full, was liable to abatement with the general legacies.

J. N. Daynes, for the plaintiffs, stated the facts.

A. Grant, K.C., and *G. R. Northcote*, for A. E. Street. If this defendant elects to take the legacy, it will not abate with the other legacies, but must be paid in full.

The case is analogous to that of a widow receiving a legacy which was given on the condition of her releasing the estate from her dower. "Where a general legacy is given in consideration of . . . . the relinquishment of any right or interest, as of her dower by a widow, such legacy will be entitled to a preference of payment over the other general legacies, which are mere bounties; and it should seem that the preference will be allowed, though the bequest should exceed the value of the right or interest relinquished by the legatee": Williams on Executors, 9th ed. p. 1217. If the wife was at the time of making the will entitled

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to any dower out of the estate, she was entitled to a preference in respect of a legacy given in lieu of dower: per Lord Hardwicke in *Blower* v. *Morret.* (1) This is the case although the legacy is of greater amount than the dower: *Davenhill* v. *Fletcher.* (2) The widow's legacy had, however, no priority where the testator left no real estate out of which she was entitled to dower: *In re Greenwood.* (3)

Where a testator bequeathed a legacy to a person between whom and himself accounts had subsisted for some time, on condition of his releasing to the executors all claims and demands on the testator, Lord Lyndhurst C.B. said that if any debt were really due he was inclined to think that the case came within the principle of the cases as to dower: *Davies* v. *Bush.* (4) In *In re Wedmore* (5) Kekewich J. held that a legacy given in satisfaction of an ascertained debt, being a mere bounty, was liable to abatement, but that forgiveness of debts due by sons to the testator amounted to specific legacies which were not liable to abatement, saying: "It has clearly been held from time to time that, first, something must be given up, and, secondly, as long as that is so, the Court will not inquire what the value of that something is."

The principle seems to be that where a legatee gives up something, it is by way of consideration for his legacy; and all the cases shew that the Courts do not inquire as to the quantum of the consideration. In *In re Lawley* (6) Cozens-Hardy L.J. said: "There are some legacies which have priority over other legacies, such as legacies to a widow in satisfaction of her dower, or to a creditor in satisfaction of a debt," and he referred to *Davies* v. *Bush.* (4) [They also referred to Theobald on Wills, 6th ed. p. 810.]

Romer, K.C., and *Harry Greenwood*, for the other legatees. In *Burridge* v. *Bradyl* (7) Cowper L.C. gives as the ground for giving priority to a legacy of an annuity to a widow for releasing her dower that she is a purchaser of her annuity

(1) (1752) 2 Ves. Sen. 420, 422.
(2) (1754) Amb. 244.
(3) [1892] 2 Ch. 295, 298.
(4) You. 341, 343.
(5) [1907] 2 Ch. 277, 280.
(6) [1902] 2 Ch. 799, 807.
(7) (1710) 1 P. Wms. 127.

whereas Lord Hardwicke in *Blower* v. *Morret* (1) puts it on a different ground. It is difficult to say on what principle the dower cases were based. It is submitted that the principle was a wrong one which should not be extended. The question is one of election. The legatee, if she elects to take the legacy, does not benefit the testator's estate, but releases a debt due from some one else. She is not a purchaser of the legacy in this case, and the legacy therefore abates: *Heath* v. *Dendy*. (2) [They also referred to *Shirt* v. *Westby*. (3)]

A. Grant, K.C., in reply.

FARWELL L.J. This is a question of very considerable difficulty, and if I were sitting in another Court, I should like to reserve my judgment; but I do not feel at liberty, sitting in this Court, to make any expansion of the law with regard to the cases as they stand at present.

It is a question of priority between legatees. No release has been executed at present, so the question is prospective and can be carried out in accordance with the interest of the parties.

The testator at the time of his death had made a settlement of two sums of money on himself for life with remainder to trustees to pay the income after his death to one Annie Eliza Street, who was in his service, for her life, and after her death on further trusts to a Primitive Methodist charity. He made his will in which he said: "I give to Annie Eliza Street 1000*l.* on condition that she releases the trustees of the fund which I have invested for the ultimate benefit of the Primitive Methodist Orphan Home from all claims by her to income from such fund and accepts this legacy in place thereof."

The cases establish—certainly as regards dower, and by dicta if not actual express decision as regards debts of an amount exceeding the legacy—that "Where a general legacy is given in consideration of a debt owing to the legatee, or of the relinquishment of any right or interest, as of her dower by a widow, such legacy will be entitled to a preference of payment over

(1) 2 Ves. Sen. 420, 422. (2) (1826) 1 Russ. 543.
(3) (1808) 16 Ves. 393.

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the other general legacies, which are mere bounties; and it should seem that the preference will be allowed, though the bequest should exceed the value of the right or interest relinquished by the legatee"—that is as regards dower. "But it is requisite that the right or interest should be subsisting at the testator's death": Williams on Executors, 9th ed. p. 1217.

In cases of dower, so long as the widow had any dower, the Court did not direct an inquiry to see what it was worth, and if there was a legacy given to her in lieu of her dower on condition that she released her dower, then she was entitled to priority over the other legatees if she did elect to take the legacy on those terms and release her dower. On the other hand, if there was no dower at all, the gift was inoperative. That rule has been applied also to a legacy. As regards the cases there is first of all *Blower* v. *Morret.* (1) Then there comes *Davies* v. *Bush* (2), which was in the Court of Exchequer in Equity. There was an administration decree, and in taking the account before the Master it appeared that the assets were insufficient for the payment of all the legacies. There had been a gift by the will "to a person between whom and the testator accounts had subsisted on condition of the legatee executing to his executors a general release of all claims and demands." It appears, although it is not stated in the report, to be plain that there was in fact no debt to such person, because the Master had made his certificate and it appeared that the assets were insufficient for the payment of all the legacies, so the debts must have been found; and the counsel arguing for the claim said: "That there was a debt must be taken for granted from the testator's direction, and the amount of the debt is immaterial." It seems to me there certainly was no debt, and it must have been ascertained one way or the other. Lord Lyndhurst did not accept counsel's argument. It is true he says "The question is, therefore, whether it is worth while to take a reference as to the existence of the debt." I think that shews that there may not have been a certificate finally binding as to the amount. It is plain if counsel could have said there was a debt, he would have brought that forward and not merely have said "You can take it

(1) 2 Ves. Sen. 420. (2) 1 You. 341, 343.

for granted because the testator has mentioned one." That comes to this—where there was no debt at all the doctrine as to priority between legatees could not be extended. Then there comes the case before Kekewich J., which I confess I find very difficult to understand, of *In re Wedmore*. (1) There the amount of the debt was very much smaller than the amount of the legacy. The debt was 1000*l*. and the legacy was 3000*l*. The learned judge said: "The debt has gone in exchange for the legacy, and the legatee takes the whole 3000*l*. as a legacy. The result is, no doubt, that she loses something out of the debt of 1000*l*. She might have avoided that by electing to claim against the will, but she claims under the will, and she takes the whole legacy subject to the usual rules of administration which affect all legacies."

Whether that is right or wrong I am not concerned to consider. The case I have is a case in which the legatee is invited to release, not any part of the testator's estate, real or personal, but a sum which was settled for the benefit of a Methodist charity, and none of the cases I have seen bear any similarity to a case of that sort. It is almost impossible to find a principle underlying a settled rule like this which has gone on for nearly two centuries without any intelligible principle being stated. When one starts with the first of the ideas of the moral claims of the widow, no doubt there is such a moral claim; but that is not a basis on which the Courts nowadays seek to administer legal or equitable rights.

Sitting as a judge of first instance I have to take the cases as I find them. I do not feel at liberty to try and add to what is so far settled law with regard to dower, and unsettled with regard to other claims, but all dealing with the testator's own estate, so that other legatees are to be postponed in order that the particular legatee may get some advantage. I know of no case in which the principle has ever been applied to such a case as this, where the advantage is given to a third person and not the testator's estate at all. I do not feel at liberty at this time of the day to try and extend what is not a very intelligible principle to a new case. The result is I must answer the question by saying

(1) [1907] 2 Ch. 277, 282.

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the legacy is not entitled to priority as is here suggested on behalf of the legatee.

The costs of all parties, as between solicitor and client, must come out of the general estate.

Solicitors for plaintiffs and A. E. Street: *E. C. Rawlings & Butt.*

Solicitors for the other legatees: *Collyer-Bristow, Curtis, Booth, Birks & Langley, for Park & Son, Hull.*

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[1861 G. 38.]

Mortgagor and Mortgagee—Foreclosure—Parties—First Mortgage of One Share—Second Mortgage of Three Shares by Three Co-mortgagors—Right of Indemnity between themselves — Foreclosure of First Mortgage — Co-mortgagors under Second Mortgage not made Parties—Effect of Foreclosure.

A co-mortgagor, liable as between himself and the other co-mortgagors to contribute a proportion only of the total debt and entitled to indemnity for any excess out of the shares of his co-mortgagors, is a necessary party to proceedings by a prior mortgagee to foreclose the share of one of his co-mortgagors.

Stokes v. *Clendon* (1790) 3 Swans. 150, n., followed.

On an event which happened in 1912 John, or the persons claiming under him, became entitled to 20,000*l.* part of, and John, William, and Walter, or the persons claiming under them respectively, became entitled in equal third shares to the residue of a fund in Court representing the residuary estate of a testator who died in 1860. In 1881 William mortgaged his share to a first mortgagee. In 1882 John, William, and Walter joined in a mortgage to the trustees of an insurance society whereby, in consideration of moneys advanced in part to John and in part by John's direction to William and Walter, John covenanted within six months after the happening of the said event to pay to the society the sum of 17,876*l.* with interest computed from the happening of the said event, and John assigned his 20,000*l.* and each of the three mortgagors assigned his one third share to the trustees of the society, subject as to William's share to the prior mortgage of 1881, and subject as to all the premises to redemption on payment by the three mortgagors, or any of them, within six months after the happening of the said event, of the said sum of 17,876*l.* with

interest; and it was thereby agreed that, as between the three mortgagors and the respective premises mortgaged by them respectively, John and the premises mortgaged by him should be primarily liable for 13,407*l.*, William and the premises mortgaged by him for 3129*l.*, and Walter and the premises mortgaged by him for 1340*l.*, and that each of them would accordingly contribute in those proportions to the payment of the total sum of 17,876*l.* and would indemnify the others against the payment of the proportion for which he was to be primarily liable, but this provision was not to affect the mortgagees or preclude them from enforcing their security in such order as they thought fit. In 1882 the first mortgagees brought a foreclosure action against William and the trustees of the society and obtained a foreclosure order absolute. John and Walter were not parties to these proceedings:—

Held, that John and Walter were necessary parties to the foreclosure proceedings and were therefore unaffected by the foreclosure; and that as against John and Walter, or persons claiming under them, William's share must be applied, first, in payment of the amount due under the first mortgage, and secondly in making good its due contribution to the mortgage to the trustees of the society.

Held, also, that as against William, or persons claiming under him, the foreclosure remained absolute, and that the balance of his share after making the payments aforesaid belonged therefore to the first mortgagee or persons claiming under him.

PETITION.

This was a petition for payment out of a fund in Court, representing the residuary estate of Joseph Gee, who died in 1860, which, in the event which happened of the death in 1912 of one Thomas Stephen Whitaker without issue, had become distributable as to the sum of 20,000*l.* to John Gee, or persons claiming under him, and as to the residue in equal third shares between John Gee, William Gee, and Walter Gee, or persons claiming under them respectively.

By an indenture dated January 1, 1881, William assigned his share to Mary Ann Barlow and Alexander Pratt Barlow to the end and intent that the same should stand charged and chargeable with and be a security for payment to the mortgagees or the survivor of them of the principal sum of 1500*l.*, advanced by the mortgagees out of moneys belonging to them on a joint account, with interest at 7½ per cent. per annum.

By an indenture dated June 15, 1882, John, William, and Walter joined in a mortgage to the trustees of the Equity and Law Life Assurance Society whereby (after reciting their several

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titles and the said mortgage of William's share dated January 1, 1881, and a proposed advance of 4180*l.* to John), in consideration of the payment of 4180*l.*, as to 3090*l.*, part thereof, to John, and as to 781*l.*, further part thereof, to William by the direction of John, and as to 309*l.*, the residue thereof, to Walter by the like direction, John covenanted with the mortgagees that, in case there should be no issue of Thomas Stephen Whitaker, John, his executors or administrators, would at the expiration of six months from the death of Thomas Stephen Whitaker pay to the mortgagees the sum of 17,876*l.* with interest thereon at 6 per cent. per annum computed from the death of Thomas Stephen Whitaker; and John thereby assigned the said sum of 20,000*l.*, and each of them, John, William, and Walter, assigned his one third share and interest in the residuary estate of Joseph Gee unto and to the use of the mortgagees, subject as to William's share to the said indenture of mortgage dated January 1, 1881, and as to all the said premises subject to redemption on payment by John, William, and Walter, or any of them, at the expiration of six months from the death of Thomas Stephen Whitaker of the said sum of 17,876*l.* and interest; and it was thereby agreed and declared between and by John, William, and Walter that, as between them respectively and the respective premises mortgaged by them respectively, John and the premises mortgaged by him should be primarily liable for 13,407*l.* and interest thereon, part of the principal sum of 17,876*l.*, William and the premises mortgaged by him for 3129*l.* and interest thereon, further part thereof, and Walter and the premises mortgaged by him for 1340*l.* and interest thereon, the remaining part thereof, and that each of them would accordingly contribute in the like proportions to the payment of the said principal sum of 17,876*l.* and interest thereby secured, and would at all times indemnify the others against the payment of the principal and interest for which he was to be primarily liable, with a proviso that this clause was not to affect the mortgagees, or preclude them from enforcing their security in such order as they might think fit.

By a memorandum dated November 17, 1882, William further charged his share in favour of one James Johnston.

On June 30, 1882, Mary Ann Barlow and Alexander Pratt

Barlow brought an action (*Barlow* v. *Gee* [1882 B. 3690]) for foreclosure of William's share, to which William, the Equity and Law Life Assurance Society trustees, and James Johnston were alone made defendants, and on November 17, 1883, they obtained judgment for foreclosure nisi. On May 8, 1884, the chief clerk made his certificate fixing October 23, 1884, as the date of payment. Meanwhile Mary Ann Barlow and one of the trustees of the Equity and Law Life Assurance Society had died, and the proceedings having thus become defective, Alexander Pratt Barlow applied ex parte for a new order, and on October 28, 1884, Chitty J. made an order on this ex parte application fixing November 11, 1884, as the day for payment, and at the same time he directed notice to be given to the defendants of the new date being fixed. The money was not paid, and on November 15, 1884, Alexander Pratt Barlow obtained an order for foreclosure absolute against William, the then trustees of the Equity and Law Life Assurance Society, and James Johnston. It did not appear on the face of this order that the direction of Chitty J. to give notice to the defendants of the new date for payment had been complied with.

Alexander Pratt Barlow died in 1898, having made a will under which T. F. Adshead became sole surviving executor. Alexander Pratt Barlow in his lifetime, and T. F. Adshead after his death, sold to several purchasers for value eight tenths of William's share, making a title thereto under the mortgage of 1881 and the foreclosure order. The remaining two tenths remained in the hands of T. F. Adshead as executor of Alexander Pratt Barlow as part of his estate.

William died in 1885 intestate, leaving John his heir-at-law and John and Walter his next of kin. Letters of administration to his estate had been granted to Alethea Lightfoot.

John died in 1889, having made a will (under which Arthur Willson Crosse became sole executor and trustee) giving all his property to his wife with remainder to his children.

By indenture dated July 16, 1873 (being a settlement made upon his marriage), Walter assigned his share to trustees on trust to raise 20,000*l.* upon the trusts therein declared, and subject thereto in trust for himself. He also created other incumbrances,

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and in 1885 was adjudicated bankrupt and was now an undischarged bankrupt.

Thomas Stephen Whitaker died without issue in 1912, and this petition was presented by the executor, widow, and only child of John, and one of the questions now raised was whether Alexander Pratt Barlow obtained a complete title to William's share under the foreclosure order, or whether John and Walter or persons claiming under them were necessary parties to the foreclosure proceedings, and, if so, what was the effect of the said order.

Cave, K.C., and *P. F. S. Stokes*, for the petitioners. William's share is still liable to make its due contribution to the mortgage to the trustees of the Equity and Law Life Assurance Society. The right of redemption was expressly reserved to the mortgagors or any of them, and John and Walter were necessary parties to the proceedings to foreclose William's share, and are not in any way bound by the foreclosure. In Daniell's Chancery Practice, 7th ed. p. 214, the practice is stated as follows: "Although it is not generally necessary in an action against the principal to make the surety a party, yet, where the person has executed a conveyance or created a charge upon his own estate, as a collateral security for another, he will be a necessary party to an action enforcing the security against the principal. Thus, in the case of a mortgage by a principal of one estate and by the surety of another, as a collateral security, a foreclosure action against the principal cannot be sustained without making the other mortgagor a party; because the other has a right to redeem, and be present at the account, to prevent the burthen ultimately falling upon his own estate, or at least falling upon it to a larger amount than the other estate might be deficient to satisfy. Where, however, the surety merely enters into a personal covenant as surety for the principal, but does not convey any estate or interest to the mortgagee, the surety will not be a necessary party unless he has paid part of the debt."

Stokes v. *Clendon* (1) is a direct authority for the first part of

(1) 3 Swans. 150, n.

that statement. See too *Payne* v. *Compton* (1); *Thorneycroft* v. *Crockett*. (2) The second part of that statement, which is founded on *Gedye* v. *Matson* (3), does not affect the present case. [They also cited *Patch* v. *Ward* (4), *Moore* v. *Morton* (5), *Welch* v. *National Cycle Works, Ld.* (6), *Bolton* v. *Salmon* (7), *Hall* v. *Heward* (8), and *Wallace* v. *Evershed*. (9)]

The decision of Turner V.-C. in *Bromitt* v. *Moor* (10) affords no argument against us, since John was not a party to the proceedings. A purchaser under the title made by the foreclosure order is in no better position than the mortgagee: *Campbell* v. *Holyland*. (11) John being the heir-at-law and one of the next of kin of William, it is also in our interest to support the contention of William's administratrix that the whole foreclosure is reopened in favour of persons claiming under William as well as under John and Walter.

Hon. F. Russell, K.C., and *Baden Fuller*, for the administratrix of William's estate. By virtue of the mortgage to the Equity and Law Life Assurance Society trustees William's share is subject to a charge in favour of John and Walter for any moneys paid by them in excess of their proper proportions, and the foreclosure proceedings being deficient for want of proper parties, the whole matter is now open in favour of William or the persons claiming under him as well as John and Walter and the persons claiming under them, and the result is in effect to reopen the foreclosure in favour of William's administratrix: *Stokes* v. *Clendon* (12); *Moore* v. *Morton*. (5)

Moreover the foreclosure absolute was bad on the face of it, for it does not appear that the second order nisi of October 28, 1884, was ever served on the defendants.

Gore-Browne, K.C., and *C. Gurdon*, for the trustees of Walter's settlement.

T. H. Carson, K.C., and *Austen-Cartmell*, for mortgagees of Walter's share.

(1) (1837) 2 Y. & C. Ex. 457.
(2) (1848) 2 H. L. C. 239, 254.
(3) (1858) 25 Beav. 310.
(4) (1862) 4 Giff. 96.
(5) [1886] W. N. 196.
(6) (1886) 82 L. T. Jour. 98.
(7) [1891] 2 Ch. 48.
(8) (1886) 32 Ch. D. 430, 435.
(9) [1899] 1 Ch. 891.
(10) (1851) 9 Hare, 374.
(11) (1877) 7 Ch. D. 166.
(12) 3 Swans. 150, n.

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Jenkins, K.C., and *A. a'Beckett Terrell*, for the executor of Alexander Pratt Barlow. The sole question is whether John and Walter were necessary parties to the foreclosure proceedings, in other words, whether at that date they had a charge on William's share by virtue of the mortgage to the Equity and Law Life Assurance Society trustees. Under that deed John was the sole covenantor, and the arrangement as between the three mortgagors as to the proportions in which their respective shares were to bear the burthen did not affect the mortgagees. John and Walter, to the extent of William's liability, were, no doubt, in the position of sureties, but that position did not give them an immediate charge on William's share, but only a potential right in certain events to call for a transfer of his share. *Gedye* v. *Matson* (1) is a direct authority to shew that a surety is not a necessary party to foreclosure proceedings unless and until he has made some payment on behalf of the principal debtor. The equity of redemption expressly reserved by the mortgage must be construed in favour of the three mortgagors according to their respective rights. The order absolute therefore was properly made and conferred a complete title on Alexander Pratt Barlow.

If, however, John and Walter, or persons claiming under them, were necessary parties and are therefore not bound by the order, the utmost that can be urged against us is that William's share is now liable to make good his proportion of the principal sum and interest owing to the Equity and Law Life Assurance Society trustees, and when that is made good the foreclosure remains absolute as against William and the persons claiming under him : *Bromitt* v. *Moor*. (2)

Buckmaster, K.C., and *J. Israel*, for a purchaser of part of William's share. First, John and Walter were not necessary parties to the foreclosure proceedings. It is a well settled rule that a surety by covenant is not a necessary party till he has made some payment on behalf of the principal debtor : *Gedye* v. *Matson* (1) ; Seton on Judgments, 7th ed. p. 1859 ; and there is no difference in principle between that case and the case of a surety who as between himself and the principal debtor has an inchoate charge on the property of the principal debtor for any money he

(1) 25 Beav. 310. (2) 9 Hare, 374.

may pay as surety. The surety may have an interest in the proceedings, but that is not enough; the surety must have an interest in the estate which is the subject of the proceedings, and that he has not got until he has made some payment. *Stokes* v. *Clendon* (1), so far as it is an authority the other way, is contrary to principle and inconsistent with the rule established in *Gedye* v. *Matson*. (2) Secondly, in any case the foreclosure is only partially opened in favour of persons claiming under John and Walter to the extent of applying William's share in payment of its due proportion under the mortgage to the Equity and Law Life Assurance Society trustees. Thirdly, if the foreclosure order confers a bad title, as alleged, it follows that the mortgagee might have exercised his statutory power of sale, and the purchasers can set up a good title in this way, all claims by John and Walter or persons claiming under them being transferred to the purchase-money. Fourthly, the purchasers are protected by s. 70 of the Conveyancing Act, 1881, which is not limited to the case of a sale under an order of the Court, but applies to any sale where an order of the Court is a link in the vendor's title. [They referred to *In re Harrowby and Paine's Contract* (3) and *Jones* v. *Barnett*. (4)] Fifthly, in any case the purchasers of portions of William's share are entitled to throw the liability of that share to contribute primarily upon the portions of that share still remaining in the hands of the executor of Alexander Pratt Barlow as part of his estate.

W. R. Sheldon, for another purchaser of part of William's share.

H. Terrell, K.C., and *T. J. C. Tomlin*, for the trustees of the will of Joseph Gee.

Clauson, K.C., and *W. S. Eastwood, H. L. Manby, H. Burrows, G. M. Hildyard, L. W. Byrne* and *R. C. F. Cotton*, for other parties.

Cave, K.C., in reply.

[*Newton* v. *Earl of Egmont* (5), *Caddick* v. *Cook* (6), Colyar

(1) 3 Swans. 150, n.
(2) 25 Beav. 310.
(3) [1902] W. N. 137.
(4) [1899] 1 Ch. 611; affirmed on appeal [1900] 1 Ch 370.
(5) (1831) 4 Sim. 574.
(6) (1863) 32 Beav. 70.

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on Guarantees, 3rd ed. pp. 323, 326, Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 5, and The Laws of England, vol. xv. p. 513, were also referred to.]

WARRINGTON J. This is a petition for payment out of Court of a large sum of money representing the residuary personal estate of the testator Joseph Gee. In the events which have happened the fund in Court has become divisible in the following manner: 20,000*l.* is payable to one John Gee, or those claiming under him, and the rest is divisible equally between William Gee, the said John Gee, and Walter Gee, or the persons claiming under them respectively. The principal question that arises for decision is whether having regard to the events to which I shall presently refer the shares of John and Walter, or the persons interested in those shares, are entitled to have a contribution from the share of William in respect of a mortgage executed by all three in favour of the Equity and Law Life Assurance Society. It is contended on behalf of the first mortgagee, under a mortgage having priority over the mortgage to the Equity and Law Life Assurance Society upon the share of William, that he had become against everybody absolute owner of that share by virtue of a decree for foreclosure made in his suit as first mortgagee, and that the right of contribution to which I have referred has gone.

Now the facts relating to this share of William are these: [His Lordship stated the facts above set out and proceeded:]

I want to say one word about a point which was taken with regard to the foreclosure proceedings. It was suggested that the second order of October 28, 1884, was irregular because it was obtained ex parte and there was nothing to shew that the defendants knew of the appointment of the second day, and they might well therefore have made default in paying through that ignorance. In order to clear that up I sent for the registrar's book, and I find that the matter was discussed before Chitty J., and that he deliberately made the order which he did, telling the plaintiff that he must give notice to the defendants of the new date being fixed. It is quite true that in the foreclosure absolute it does not appear on the face of it that that direction of the learned

judge was complied with, but at this length of time, and in the absence of any evidence to the contrary, I think I must assume that it was complied with, and that the proceedings were therefore regular. We start with this, therefore, that the foreclosure proceedings were regular subject only to the objection to which I am now going to refer. It is said by those claiming under the Barlows that the effect of those foreclosure proceedings is to destroy the equity of redemption in the property comprised in their mortgage and therefore to leave that mortgage what it is in form, an absolute assignment of the premises comprised in it. If full effect were given to that contention, it would of course deprive John and Walter and those claiming under them of the right which under the deed of 1882 they undoubtedly possessed, subject of course to the payment of the Barlow mortgage, to have William's share duly applied, so that it may make its contribution of 3000*l.* odd to the whole 17,000*l.* odd which has to be paid to the Equity and Law Life Assurance Society. The persons claiming under the Barlow mortgagees say that is the effect of the foreclosure, and it certainly would be the effect of the foreclosure but for a defect which is relied upon by those representing John and Walter, namely, that they were not parties to the foreclosure proceedings. The question then is, were John and Walter, or those claiming under them, necessary parties to those foreclosure proceedings? If they were not necessary parties, it is somewhat startling to find that the rights which they would otherwise have possessed are affected by a judgment in proceedings to which they were not parties. That their rights are affected there is no question. It may be, however, that the course of the Court is such that this result properly flows from the proceedings which have been taken. The general rule unquestionably is, with regard to foreclosure proceedings, that every person who has an interest in the property the subject of the mortgage must be made a party to the proceedings, and if he is not made a party his interest is not bound. Had John and Walter then any interest in the property so that they ought to have been made parties to the foreclosure proceedings? The property, the subject of the foreclosure action, was the share of William only. That was all in which the Barlows had any interest, and it was the

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equity of redemption in that share which by their foreclosure proceedings they were seeking to bar.

Now there is some authority on the question to which I will presently refer, but I should like first to deal with it as a matter of principle independently of authority. Two persons mortgage in one deed their respective estates to secure an advance made to one of them, and the deed gives to each of them power to redeem, and it appears on the face of the deed that as between the two the estate of the person to whom the money is paid is to be primarily liable. Has not the person who joins in mortgaging his own estate by virtue of that deed itself an interest in the estate of the person to whom the money is advanced? In my opinion he has, and I think that the nature of his interest is a charge upon the estate of the principal debtor by way of indemnity for the purpose of enforcing against that estate the right which he has, as between himself and the principal debtor, to have that estate resorted to first for the payment of the debt. If it were not so, the result would be a startling one. The first mortgagee brings an action against his own mortgagor, and against the second mortgagee, whose mortgage includes what I may, though perhaps somewhat inaccurately, describe as a collateral security given by a person to whom the money under the second mortgage was not advanced. It may be that the second mortgagee is content to rely upon the collateral security and does not care to redeem the first mortgage, and it would be an extraordinary thing if the result were in his absence to destroy the right of indemnity which the owner of the collateral security has as against the property of the person to whom the money under the second mortgage was advanced. In my opinion, therefore, on principle a co-mortgagor must be held to have an interest in the property of his co-mortgagor, who by the mortgage deed is to be regarded as, and whose property is to be regarded as, primarily liable. The case, however, is not without authority, and the authority seems to me to be perfectly plain. It is a decision by the Master of the Rolls in the year 1790 and is reported in a note in 3 Swanston at p. 150 as follows: "The case was of a principal mortgagor, and another mortgagor of an estate as a collateral security. His Honor determined,

that a bill of foreclosure against the principal only could not be sustained, without making the other mortgagor a party; because the other mortgagor has a right to redeem and be present at the account, to prevent the burthen ultimately falling on his own estate, or at least falling upon it to a larger amount than the first estate might be sufficient to satisfy: Ordered to stand over for want of parties." So far as I can see, that decision has been treated in all the text-books as an authority expressing the practice of the Court. The only suggestion against it is that there are dicta—there does not appear to be any absolute decision—shewing that a mere surety by covenant who has paid nothing is not a necessary party to a foreclosure proceeding. I accept that proposition, but in my opinion there is a material distinction between a mere surety by covenant and a person who has joined as co-mortgagor. In my judgment a person who has joined as co-mortgagor in such a deed as this has from the moment when the deed is executed an interest in the estate of the principal mortgagor. I think, therefore, that John and Walter were necessary parties to these proceedings, and not having been made parties to these proceedings, they are not bound by them, and their rights remain unaffected. So far then the position is this: the share of William, as against John and Walter, or persons claiming under them, must be applied first in paying what is due to the Barlows under their mortgage, and then in making its due contribution to the amount payable to the Equity and Law Life Assurance Society. Then comes the question, what is to be done with the balance? The Barlows, or persons claiming under them, say that they have, at all events, a clear decree for foreclosure as against William, the owner of the equity of redemption, and that, subject to making the contribution to which I have already referred, they are absolutely entitled to this share. Persons claiming under William, on the other hand, say that if John and Walter were necessary parties to the foreclosure proceedings, then the foreclosure judgment is imperfect, the whole matter is open, and they have a right to redeem John and Walter, and they still having this right, the matter must be worked out as if the order for foreclosure had never been made. In my judgment that argument ought not to

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succeed. I think the answer to it is quite plain on considering the true nature of a decree for foreclosure. To take this particular case, by the deed of 1881 William assigned his share to the Barlows subject no doubt to a right of redemption on payment of what was due to them. Foreclosure means that that right of redemption is destroyed. The foreclosure order absolute was made in an action in which William was a party, and by the express terms of the order he stands absolutely debarred and foreclosed from any equity of redemption. The result, in my judgment, is that the deed stands as an absolute assignment of the share to the Barlows, and I see nothing in the defect arising from the absence of John and Walter to affect the order so far as regards William himself. In my opinion, therefore, subject to making the due contribution to which I have already referred, the share of William will be payable to the persons claiming under the Barlows.

[His Lordship also held that as a matter of construction of their purchase deeds the purchasers of portions of William's share were entitled to throw the liability to contribute to the mortgage to the trustees of the Equity and Law Life Assurance Society primarily upon the portions of William's share still remaining in the hands of the executor of Alexander Pratt Barlow as part of his estate.]

Solicitors: *Crosse & Sons; T. F. Adshead; Bertie F. Browne; Kingdon, Wilson & Webb, for Frankish, Kingdon & Wilson, Hull; Treherne, Higgins & Co.; Wigan, Champernowne & Prescott; Norton, Rose, Barrington & Co.; F. A. P. Woodward; Rooper & Whately; G. S. & H. Brandon; Reep, Lane & Co.; Rollit, Sons & Hart; Adams & Adams.*

A. C.

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1913
May 6, 7.

In re FOX.
BROOKS *v.* MARSTON.

[1913 F. 306.]

Limitations, Statute of—Mortgage—Real Estate—Trust for Sale—Proceeds of Sale—Real Property Limitation Act, 1833 (3 & 4 *Will.* 4, *c.* 27), *ss.* 1, 34—*Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *s.* 8.

A mortgagor's interest in the proceeds of sale of land held on trust for sale is an interest in "land" as defined by the Real Property Limitation Act, 1833, s. 1, and therefore, under s. 34 of the same Act and s. 8 of the Real Property Limitation Act, 1874, after the lapse of twelve years, in the absence of any payment or acknowledgment, the title of the mortgagee is extinguished.

In re Hazeldine's Trusts [1908] 1 Ch. 34, and *Kirkland* v. *Peatfield* [1903] 1 K. B. 756, followed.

Adjourned Summons.

Richard Fox, who died in 1878, by his will dated September 19, 1876, devised and bequeathed his real and personal estate to trustees upon trust for sale and conversion, with power to postpone such sale and conversion for so long as they should think fit, and, after payment thereout of his debts and funeral and testamentary expenses, to invest the residue of the moneys to arise from such sale and conversion, and to stand possessed of one fourth share thereof in trust to pay the income to his sister Mary Freeman (formerly Marston) during her life, and after her death to hold the same in trust for her children who being sons should attain twenty-one or being daughters should attain that age or marry.

Mary Freeman had five children who attained twenty-one, of whom G. H. Marston was one.

The testator at the date of his death carried on a farming business in partnership with his brother Frederick Fox, and Frederick Fox brought an action (*Fox* v. *Brown* [1879 F. 85]) to have the partnership accounts taken and the partnership wound up and for the administration of the estate of the testator, in which, by an order of Chitty J. dated May 11, 1885, it was ordered that the trustees of the will should be allowed to be the purchasers of certain

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real estate therein referred to, being as to part real estate belonging to the partnership, and as to the residue being real estate to which the testator was solely entitled, such real estate when purchased to be held by the trustees of the will as personal estate, and upon the trust for sale and otherwise upon the trusts of the testator's will declared in respect of the one fourth share of Mary Freeman and her children.

The purchase price for the said real estate was 1530*l.*, which was to be set off against the share of Mary Freeman and her children in the residuary estate. This share proved to be deficient, and the residue of the purchase-money was found by one of the trustees and secured by a charge on the shares of the children of Mary Freeman.

By an indenture dated April 19, 1886, G. H. Marston assigned his share and interest in the residuary estate of the testator, and the "lands, moneys, stocks, funds, shares, and securities" held upon the trusts of the said will in favour of Mary Freeman and her children, to Messrs. Crouch, Edwards & Heron, to secure certain principal moneys and interest. Notice of this mortgage was given to the trustees of the will.

By an indenture dated November 16, 1886, the real estate in question was assured pursuant to the terms of the order to the trustees of the will to be held by them as personal estate upon trust for sale and otherwise upon the trusts by the said will declared in respect of the one fourth share of the testator's residuary estate settled in favour of Mary Freeman and her children. The effect of the order and conveyance was in substance to appropriate the real estate in question to answer the whole of this one fourth share.

On April 19, 1886, G. H. Marston was adjudicated bankrupt and was still an undischarged bankrupt.

Mary Freeman died on March 8, 1888.

Down to February, 1900, the share of G. H. Marston in the rents of the real estate had been paid to Messrs. Crouch, Edwards & Heron by the former trustees of the will, but since that date no payments had been made to them in respect of interest or principal, nor had any acknowledgment been given.

In November, 1911, the present trustees of the will sold the

real estate pursuant to the trust for sale, and now had in hand a sum of 185*l.*, representing the share of G. H. Marston of the proceeds of sale and of rents received since February, 1900.

This was an adjourned summons taken out by the present trustees of the will, raising the question to whom the 185*l.* now belonged.

P. F. S. Stokes, for the trustees.

W. R. Sheldon, for the trustee in bankruptcy of G. H. Marston. The interest of a cestui que trust in the proceeds of sale of land under a trust for conversion is a "share, estate or interest" in land within the definition contained in the interpretation clause in s. 1 of the Real Property Limitation Act, 1833: *In re Hazeldine's Trusts* (1), where the point was decided in 1905 on summons in chambers and the decision approved of by the Court of Appeal; *Kirkland* v. *Peatfield* (2); *Brook* v. *Badley* (3); *Bowyer* v. *Woodman.* (4) The mortgage therefore being a mortgage of land and not of personal estate, the effect of s. 34 of the Act of 1833 coupled with s. 8 of the Real Property Limitation Act, 1874, is to extinguish the mortgagees' title after the lapse of twelve years without payment or acknowledgment, and the trustee in bankruptcy of the mortgagor is now entitled to this money.

G. H. Marston appeared in person.

Hansell, for the mortgagees. It is admitted that s. 34 has no application except to a mortgage of land: *Smith* v. *Hill* (5); *In re Hazeldine's Trusts* (1); and the only question is whether this mortgage was a mortgage of land or of personal estate. In *In re Hazeldine's Trusts* (1) the trust was to convert at the discretion of the trustees and the land had in fact never been sold. In the present case the order of May 11, 1885, amounted in effect to a sale of the land though it took the form of an appropriation of land to answer the one fourth share with a direction that the share was to be held as personal estate. The mortgage which was made after the date of that order was to all intents and purposes a

(1) [1908] 1 Ch. 34.
(2) [1903] 1 K. B. 756.
(3) (1868) L. R. 3 Ch. 672.
(4) (1867) L. R. 3 Eq. 313
(5) (1878) 9 Ch. D. 143.

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mortgage of a reversionary share of personal estate, and the word "lands" was only inserted ex abundanti cautela. By the mortgage in *In re Hazeldine's Trusts* (1) the mortgagors conveyed all their interests in the real property and in "the proceeds thereof," treating it, as it was in fact, as an unexecuted trust for sale. *Brook* v. *Badley* (2) was a decision under the old Statute of Mortmain (9 Geo. 2, c. 36, s. 3) and throws no light on the Real Property Limitation Acts. *Bowyer* v. *Woodman* (3) was a decision on s. 42 of the Real Property Limitation Act, 1833, and is explained by Romer L.J. in the course of the argument in *In re Lloyd.* (4) The observations of Wright J. in *Kirkland* v. *Peatfield* (5) were not necessary for the decision in that case and go too far.

No reply was called for.

WARRINGTON J. There is a sum of 185*l.* in the hands of the trustees of the will which is now claimed, first, by certain mortgagees, secondly, by the trustee in bankruptcy of the mortgagor, and, thirdly, by the mortgagor himself, but it is perfectly clear that the mortgagor has no right to the money as against his trustee in bankruptcy. The real question is between the mortgagees and the trustee in bankruptcy of the mortgagor. The trustee in bankruptcy says that the mortgagees' title is extinguished by the Statute of Limitations, and that depends upon whether the mortgage in question was a mortgage of an interest in land. [His Lordship stated the facts and proceeded:] Is this mortgage a mortgage of land or "any share, estate, or interest" in land within the meaning of the Real Property Limitation Act, 1833, in which case the mortgagees' title is now extinguished by virtue of s. 34 of that Act and s. 8 of the Real Property Limitation Act, 1874, or is it a mortgage of personal estate, in which case there is no statute of limitation applicable? The question mainly depends on the true construction of the interpretation clause contained in s. 1 of the Act of 1833, which says that the word "land" shall extend

(1) [1908] 1 Ch. 34.
(2) L. R. 3 Ch. 672.
(3) L. R. 3 Eq. 313.
(4) [1903] 1 Ch. 385, 395.
(5) [1903] 1 K. B. 756.

to, amongst other things, "any share, estate or interest" in land, "whether the same shall be a freehold or chattel interest." Is the interest which a person takes in the proceeds of sale of land an interest in land? In my opinion it is. There appear to be two authorities directly in point. In *In re Hazeldine's Trusts* (1) there was, as in the present case, a gift by will of real and personal estate to trustees upon trust for sale and conversion, creating no doubt a conversion of the real estate in equity; and, so far as the will goes, that case is exactly similar to the case with which I am now dealing. Two beneficiaries had mortgaged their interests under the will to a bank, and in 1905, after the period fixed by the Statutes of Limitation had expired, the bank issued a summons before me asking in effect for an inquiry as to priorities and for payment of the mortgagees in order of priority. That summons was dismissed in chambers on the ground, as I think, that the claim of the bank was barred by the Statutes of Limitation. At a subsequent date the mortgagors applied to the Court for payment out to them, and the bank appeared on the hearing of that summons and insisted that they ought to be paid the amount due to them under their mortgage. The decision of the Court of Appeal was that the right of the bank was barred, and that the fund ought to be paid to the mortgagors. Cozens-Hardy M.R., referring to the summons of 1905, says (2): "It proceeded on the footing that under s. 34 of the Real Property Limitation Act of 1833, as amended by the Act of 1874, the title of the mortgagees against the mortgaged property, of which this fund in Court was part, was extinguished at the end of twelve years. That was decided, and that is not now open to appeal, and in saying that I do not wish to suggest that I have any doubt as to the propriety of that decision." I need not read further. Fletcher Moulton L.J. says (3): "I have come to the same conclusion, principally on the ground that the mortgagees' summons was dismissed and that no appeal was brought from that dismissal. I do not suggest that the summons was not rightly dismissed."

The matter had previously come before Wright J. in *Kirkland*

(1) [1908] 1 Ch. 34. (2) [1908] 1 Ch. 38.
(3) [1908] 1 Ch. 39.

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v. *Peatfield.* (1) That was an action on a covenant to recover money secured by mortgage. In that case too the subject of the mortgage was an interest in the proceeds of sale of land devised on trust for sale, and the question was whether the money payable under the covenant was "money charged upon or payable out of land" within s. 8 of the Real Property Limitation Act, 1874, to which the interpretation clause contained in s. 1 of the Act of 1833 is applicable, and Wright J. held that it was. He says (2): "The defendants contend that the claim is barred by s. 8 of the Real Property Limitation Act, 1874, as the last payment of interest was made more than twelve years before action. The plaintiff says that this is a mortgage not of land but of personalty, that s. 8 does not apply, and that the period of limitation applicable is twenty years, not twelve. I have no doubt whatever that this fund ought, for the purpose of the mortgage, to be regarded as land. I should have thought so even if the land had already been sold."

I hold that at the time of its execution this mortgage was a mortgage of land. Then it is quite clear that, no part of the principal or interest having been paid for more than twelve years and no acknowledgment having been given, the effect of s. 34 of the Act of 1833 is absolutely to extinguish the mortgagees' title. [His Lordship read s. 34 and proceeded:] In my opinion, therefore, this mortgage was a mortgage of land the title to which has been absolutely extinguished, and the money in the hands of the trustees of the will must be paid to the trustee in bankruptcy of the mortgagor.

Solicitors: *Bone & Heppell; Tarry, Sherlock & King; C. Haddon Gray; Edwards, Heron & Co.*

(1) [1903] 1 K. B. 756. (2) [1903] 1 K. B. 758.

A. C.

In re PREMIER UNDERWRITING ASSOCIATION, LIMITED (No. 2). CORY'S CASE.

NEVILLE J.
1913
April 24, 25

[00103 of 1909.]

Insurance Company—Company limited by Guarantee and not having a Capital divided into Shares — Winding-up — Articles of Association — Construction — "Members" — Directors "ex officio members" — Whether liable as Contributories—Companies Act, 1862 (25 & 26 *Vict.* c. 89), *s.* 9, *sub-s.* 4; *ss.* 14, 71; *Sched. II., Form B—Companies* (*Consolidation, Act*, 1908 (8 *Edw.* 7, *c.* 69), *ss.* 10, 118; *Sched. III., Form B—Companies* (*Winding-up*) *Rules*, 1909, *r.* 80.

The memorandum of an insurance company limited by guarantee and not having a capital divided into shares followed sub-s. 4 of s. 9 of the Companies Act, 1862, and limited the liability of its members to 5*l.* per policy. Its articles provided that the company should consist of the several persons who for the time being should have insured or should have agreed to insure in the company; that every person who insured with the company should as from the date of such insurance be deemed to have been a member of the company, and every such person should be deemed to have ceased to be a member so soon as he should be no longer insured in the company; that each member for the time being of the directors should "ex officio be a member of the company"; that the first directors should be the subscribers of the memorandum, but that directors should not "necessarily be members other than ex officio members." Then followed usual provisions for the election of directors at annual general meetings of the company, one third of the directorate for the time being retiring in rotation every year, but being eligible for re-election.

Four of the original directors were signatories to the memorandum, and from time to time at annual general meetings of the company retired in rotation from the directorate and were re-elected, and were directors when the company went into liquidation. Their names never were on the register of members and they never insured with the company, but they represented limited companies whose names were on the register and who insured with the company. The liquidator placed on the list of contributories the four directors in their character of directors, and also the companies they represented, as members liable to contribute to the assets of the company:—

Held, that the four directors were not liable as such to contribute as members to the assets of the company and were therefore entitled to have their names removed from the list.

When a person, whose name has been placed on the list of contributories in a particular character, successfully applies to have his name

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removed from the list in that character, it is not open to the liquidator on the same application to contend that he is entitled to retain the name of the applicant on the list in another character.

ADJOURNED SUMMONS.

This was an application by the directors of the above-named association, whose names had been placed on the list of contributories in their character of directors, to have their names removed from the list under these circumstances.

The association was incorporated with memorandum and articles of association in January, 1903, as a company limited by guarantee, and not having a capital divided into shares.

The objects of the association, as defined by clause 4 of the memorandum, were (inter alia) the insurance, whether upon the mutual or any other principle or partly on one principle and partly on another, against every description of marine risk which might be lawfully undertaken upon steamships of all kinds, in which the members of the association as defined by the articles were interested as owners, part owners, managing owners, mortgagees, trustees, agents, or otherwise; and the taking of reinsurances from any other association, underwriter, or any other person, firm, or company, on any steamships, freights, outfits, or upon any other interests whatever in connection therewith. And it was thereby declared that the word "association" in the now stating clause should be deemed to include any partnership or other body of persons, whether incorporated or not incorporated, and whether domiciled in the United Kingdom or elsewhere.

Clause 5 of the memorandum was as follows:—

"Every member of the association undertakes to contribute to the assets of the association in the event of the same being wound up during the time he is a member or within one year afterwards for payment of the debts and liabilities of the company contracted before the time at which he ceases to be a member, and the costs, charges and expenses of winding up the same, and for the adjustment of the rights of the contributories amongst themselves, such amount as may be required, not exceeding five pounds, in respect of each policy then in force."

The material clauses of the articles of association were as follows:—

"1. 'Member' means a member of the association.

"'Owner' means and includes a sole owner, a joint owner, a partner of an owner and interested with him, an owner holding separate shares in severalty, a part owner, a managing owner, an agent, a broker, a mortgagee, and a trustee of a steamship or parts or shares of a steamship, and a manager of a steamship company.

"Words importing persons include partnership firms and corporations.

"2. The association, for the purpose of registration, is declared to consist of an unlimited number of members.

"3. The association shall consist of the several persons who shall for the time being be insured, or shall have entered or agreed to insure in the association steamships or other insurable interests connected therewith.

"4. Every person who insures or reinsures any steamship or steamships, or share or shares of a steamship, or other insurable interest connected therewith, in the association, shall, as from the date of the commencement of such insurance, be deemed to have become a member of the association; and every such person shall be deemed to have ceased to be a member so soon as he shall no longer have any steamship, or share or shares of a steamship, or other insurable interest in connection therewith, under insurance in the association, but without prejudice to the rights and remedies of the association against the person so ceasing to be a member in respect of obligations incurred up to the time of his ceasing to be such member.

"5. Each member for the time being of the directors and the managers shall ex officio be members of the association."

"25. Unless otherwise determined by a general meeting, the number of directors shall not be less than three or more than twenty. The first directors shall be the subscribers of the memorandum of association, and they shall hold office till the annual general meeting in 1904. The directors shall not necessarily be members other than ex officio members of the association.

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"26. At the annual general meeting in the year 1904, and at the annual general meeting in every subsequent year, one third of the directors for the time being, or if their number is not a multiple of three, then the number nearest one third, shall retire from office. The one third or nearest number to retire in the years 1904 and 1905 shall, unless the directors agree amongst themselves, be determined by lot. In every subsequent year, one third or the nearest number who have been longest in office shall retire.

"27. A retiring director shall be eligible for re-election, and shall remain in office until his successor is appointed.

"28. The association, at the general meeting at which any directors retire in manner aforesaid, shall elect a like number of members of the association to be directors."

"41. Every engagement or liability of a member of the association in respect of any insurance or reinsurance shall (for all purposes relating to enforcing such engagement or liability) be deemed to be an engagement or liability on his part to the association, and all moneys payable thereunder shall be paid by him to the association.

"42. All claims in respect of insurances or reinsurances shall be made and enforced against the association only, but the association shall not be liable to any member, or other person, for the amount of any loss, claim or demand, except to the extent of the funds which the association is able to recover from the other members or persons liable for the same, and which are applicable for that purpose."

"44. For the purpose of providing funds for making payments necessary or proper to be made by or on behalf of the association, it shall be lawful for the directors from time to time to direct that there shall be paid to the association by the members thereof such sums as the directors may from time to time deem necessary."

Messrs. Cory, Doughty, Macarthy, and Thompson, and several other persons, subscribed the memorandum and articles of association, and as such subscribers were the first directors of the association. The statutory meeting of the association was held in May, 1903. At the annual general meeting held in

June, 1904, Doughty and Macarthy were two of the directors who retired by rotation, and were re-elected. At the annual general meeting held in June, 1905, Cory and Thompson were two of the directors who retired in rotation, and were re-elected. At the annual general meeting held in June, 1906, a Mr. Lunn was appointed a director for the first time in the place of a retiring director. At the annual general meeting in June, 1907, Doughty and Macarthy on retiring in rotation were re-elected directors; and at the annual general meeting in June, 1908, Cory and Thompson on retiring in rotation were re-elected directors. All these five persons were directors of the association when it went into voluntary liquidation on February 17, 1909. Their names were not and never had been on the register of members and they individually had never effected insurances with the association; but Messrs. Cory, Doughty, Macarthy, and Thompson were interested in and represented shipping companies, and Mr. Lunn was a partner in and represented a shipping firm, and these shipping companies and the partnership firm were respectively insured in the association and their names were on the register as members.

In December, 1909, the liquidator placed on the list of contributories the names of Messrs. Cory, Doughty, Macarthy, Thompson, and Lunn in their individual character of directors, and also the names of the shipping companies and firm they respectively represented, as members liable to contribute to the assets of the association to the extent of 5*l.* per policy. Thereupon the five directors and John Cory & Sons, Limited (one of the shipping companies), issued a summons asking (1.) that the list of contributories settled by the liquidator might be varied by excluding their names therefrom; and (2.), alternatively, that the applicants John Cory & Sons, Limited, might be liable only for 5*l.* per policy in respect of every policy in force on February 17, 1909, between such applicants and the association.

The second point raised by this summons was first litigated and was carried to the House of Lords, and eventually in January, 1913, their Lordships gave judgment holding that the liability of the applicants John Cory & Sons, Limited, was not confined to the policies between them and the association, but

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extended to every policy of the association in force on February 17, 1909, the date of the commencemen of the winding-up.

The first point raised by the summons now came on for determination.

Younger, K.C., and *Stokes*, for the summons. The question is whether upon the true construction of the memorandum and articles these gentlemen, qua directors, are members liable to contribute to the assets of the association. We say they are not, and that a director has no personal liability who is merely an ex officio member representing a company or firm who is an insured member holding policies of the association. Articles 3 and 4 define the persons who are members of the association and that they cease to be members when they cease to insure in the association except as to liabilities incurred during their membership. Then article 5 says that the directors shall ex officio be members, and articles 25 to 28 contain usual directions for the election and retirement of directors, except that article 25 provides that the directors shall not necessarily be members other than ex officio members, and articles 41 to 44 are directed to the business of the association and to the calls to be made on members who insure. It is to be observed that s. 14 of the Companies Act, 1862, reproduced in s. 10 of the Companies (Consolidation) Act, 1908, requires that a company limited by guarantee shall have a memorandum and articles of association; and then s. 71 of the Act of 1862 provides that the memorandum and articles of such a company shall follow Form B in the Second Schedule to the Act, and these provisions are re-enacted in s. 118 and Sched. III., Form B, of the Act of 1908. The definition of "members" in articles 3 and 4 of this association and its memorandum follow Form B. Therefore if you want any liability other than that imposed by statute you must find it in the articles or in a policy. Here the liability of members under the articles is under articles 41 to 44 confined to members having insurances, and the limit of their contribution is prescribed by the memorandum. The policies provide that calls shall be made in proportion to the amounts insured and can

only be made on persons who have policies, and therefore cannot apply to members who have not insured, and for this purpose "ex officio members" means something different to members as defined in articles 3 and 4, which articles are exhaustive as to membership and liability. Some meaning must be attributed to the expression "ex officio member." We say article 5 means only this—that the true members under articles 3 and 4 agree inter se that directors shall be entitled to the privilege of membership, i.e., of becoming insurers, but that does not bind the directors to become members, and that view is borne out by the qualification in article 25 that directors shall not necessarily be members other than ex officio members. The articles impose no qualification for membership on the directors, and there is no contract between them and the association that they shall become members, and that is indicated by their names never having been placed on the register of members. Four of these directors signed the memorandum, but when they respectively retired in rotation from the directorate they ceased to be directors de jure, and on their re-election as directors they were not members within the meaning of article 28 because none of them personally effected insurances with the association. As to Mr. Lunn, he was not a member under articles 3 and 4 when he was elected a director and was not bound to become a member. It is submitted that under the articles a distinction is drawn between members and ex officio members, and that, having regard to the definition of "member" in articles 1, 3, and 4 and the objects of the association as defined in the memorandum, it was not the intention of the articles and memorandum that directors, who had no personal interest in the association beyond that of the members they represented, should incur personal liability as members beyond the liability of the members they represented. If the names of these directors, qua directors, remain on the list the liquidator will get two contributions from them under the memorandum, i.e., not only as members of a company or firm, but also as directors. A further point may have to be argued, namely, whether four of these directors are to be placed on the list of contributories as signatories to the memorandum.

Tomlin, for the liquidator. The memorandum and articles

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must be read with the statute, and I contend that under clause 5 of the memorandum and articles 3, 4, and 5 a person who becomes a director is involved in liability as a member to contribute to the assets of the association. In other words, I say that ex officio means that a person who becomes a director becomes by virtue of his office a member of the association in contradistinction to others who become members by virtue of their contracts of insurance with the association, and sub-s. 4 of s. 9 of the Act of 1862 provides what the liability of a member shall be, and clause 5 of the memorandum, which follows the statute, limits that liability to 5*l.* per policy. That is the essence of the contract between the members. The law does not recognize an ex officio member, and a company cannot by its articles create something unknown to the law. The heading "Definition of members" in the articles applies to articles 4 and 5, and these gentlemen having accepted office as directors are not necessarily insurers, but by virtue of their office are members bound by the memorandum which imposes on them a liability to the extent of 5*l.* per policy, which is a security to the association that its interests shall be looked after, and there is nothing in the subsequent articles which cuts down their liability as members. Articles 25 to 28 are no doubt open to some criticism, but do not alter the position under articles 4 and 5. Articles 41 to 44 only apply to insured members. These directors are members under articles 4 and 5 and cannot say that that construction is nugatory.

NEVILLE J. The point I have to dispose of is whether election to the directorate of this association involved the directors in a liability as members of the association similar to that of those who, within the definition of members in article 4, are insured members in the company.

Of course, one has to consider the nature of the association, and one knows that these associations are formed for the purpose of mutual insurance, some preferring to provide for their risks at sea in this particular way, their liability fluctuating in accordance with the good or bad luck attending the risks that they undertake. It would be startling to find that the board of

directors, qua board of directors, and the managers of the company, qua managers of the company, should, by virtue of the articles, be involved in a liability equal to that of those who were obtaining the advantages of the association by the insurance of their own ships. I do not think I am entitled to consider the question from the point of view of what was supposed to be the true construction of the memorandum and articles with regard to the liability of the members, because we now know on the highest authority that the memorandum and articles involved a very heavy liability, a liability of 5*l.* in respect of every policy extant at the commencement of the winding-up. I find it difficult to suppose that directors or managers of the company could ever be obtained if the condition of the office were that they were to undertake such a liability in respect of all the business they acquired or undertook on behalf of the association.

Now in the articles I have to consider I find, first of all, a definition of "members" in article 4 which is in accordance with the form usual with companies of this kind and which limits membership in the association to the persons who have insured their ships in it. Then comes this curious provision in article 5: "Each member for the time being of the directors and the managers shall ex officio be members of the association." I quite agree with Mr. Tomlin that prima facie that reads as if a person accepting a directorship or a managership under the company thereupon became a member, and the question is whether there is anything to indicate that that membership is of a kind identical with that of the persons who come within the definition of members in article 4, or whether in fact it was intended to be something different not involving liability. I have already pointed out that the probabilities are very strongly in favour of the view that this separate definition in article 5 was intended to be a definition of something different from that which is contained in article 4, although "member" is used in both cases, that is to say, that there are two classes of members intended, first of all members comprised in the definition in article 4, and secondly the ex officio members described in article 5.

Now what seems to me to determine the matter is article 25,

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because there it is said, "The directors shall not necessarily be members other than ex officio members of the association." I think that shews that the articles are supposed to have created a distinct class of members, the ex officio members, who differ so much from the ordinary members that by being made ex officio members they do not necessarily become members. They may, because if they insure they would be both ex officio members and members who were insurers, and in that case, of course, their liability would exist. But it seems to me, taking articles 5 and 25 together, that the right conclusion is that, whatever was meant by "ex officio members of the association," it did not mean a class of persons bound to contribute to the liabilities of the company in the same way as the members defined by article 4, or indeed at all. There were objects of membership apart from the question of insurance and contribution, because there was the voting power and there was the necessity of being a member of the company before you could be made a director of the company, the directors being eligible only, as I understand the subsequent articles, if they were members of the company. Whether or not it was possible for the articles to create this peculiar kind of membership I do not know. It may be that these provisions are entirely nugatory, and if during the currency of the company the point had been raised I have no doubt difficult questions might have been involved; but I think it is impossible to say that, because the association attempted by its articles to do what it was legally incapable of doing, it thereby involved the directors and managers in a liability which the articles do not profess to impose on them. I am of opinion therefore that the directors, qua directors,—I have only to deal with directors here —are not liable as members to contribute to the losses of the company. That disposes of the first point. There remains the question of the signatories to the memorandum.

Younger, K.C. Then so far as Mr. Lunn is concerned, his name goes off the list of contributories altogether, and he escapes liability. He is not a subscriber to the memorandum of association. The other four directors are subscribers to the memorandum, and as to them there is the further question whether

they are liable as members by reason of their having signed the memorandum in a representative capacity.

Tomlin. I am prepared to argue that question now.

Younger, K.C. It is submitted that it is not open to the liquidator to take the point on this summons. These gentlemen were placed on the list of contributories as being directors. There is no suggestion in the list that they are placed there as being subscribers to the memorandum, and there are a great number of other subscribers to the memorandum who have not been placed on any list of contributories, as such. The Act and r. 80 of the Companies (Winding-up) Rules, 1909, require that the character in which persons are placed on the list should be stated. The character in which these gentlemen are placed on the list is as directors, and in that character your Lordship holds they ought not to be there, and the list should be varied by striking them out in the only character in which they are placed there. It is neither open to the liquidator nor convenient that this particular point should be taken on this summons, but if the liquidator seeks to establish any liability on the subscribers to the memorandum, as such, he can make a supplemental list of contributories and put on that list all the persons he thinks ought to be on it in that character. The matter is one of such importance that it ought to be dealt with by a separate summons.

Tomlin. The point is raised on the evidence.

Younger, K.C. No. The facts are stated with the view of shewing that these gentlemen ought not to be made liable twice, i.e., as members of a company or firm and also as directors. But not a word is said about their liability as signatories of the memorandum.

Tomlin. The affidavits state the circumstances under which they signed the memorandum. If the course suggested is adopted, it means that the liquidator will be driven formally to put these gentlemen on the list again, and then another summons will be taken out and we shall come here again.

NEVILLE J. A man finds himself on the list of contributories under a particular designation, and, thereupon, thinking that the liquidator has no right so to put him on, applies successfully

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to have his name removed from the list. I doubt, in the absence of authority, that it is open to the liquidator to say "It is quite true that I had no right to put you on the list in the capacity I did, but I have a right to put you on it in another capacity, and, consequently, you cannot succeed on your summons." I think the right course to adopt is to order the list of contributories as settled by the liquidator to be varied by striking out the names of these gentlemen as directors, but without prejudice to any question of the liquidator's right to put them on again in any other capacity. The costs of this summons will be paid out of the assets of the company.

Solicitors for applicants: *Parker, Garrett & Co.*

Solicitors for liquidator: *Coward & Hawksley, Sons & Chance.*

H. L. F.

NEVILLE J. 1913 *May 2.*

In re MUDGE.

[1899 M. 810]

Marriage Settlement—Covenant to settle after-acquired Property—"Interest in expectancy."

In 1864 a testatrix by her will gave a fifth share of her residuary estate to her daughter W. for life, with remainder to her children, but if she died without issue (which happened) "her share to go to her next of kin as if she had not been married."

In 1865 J., another daughter of the testatrix, married and by her marriage settlement covenanted that any real or personal property to which she then was entitled for any estate or interest whatsoever in reversion, remainder, or expectancy should be settled upon the trusts of the settlement.

In 1912 W. died without issue and leaving J. her sole next of kin:—

Held, that the interest J. had at the date of her marriage in the settled share of W. was not a mere spes successionis but an "interest in expectancy" which was caught by her covenant.

ADJOURNED SUMMONS.

Mary Mudge, widow, by her will dated June 26, 1862, after making certain specific bequests, gave the residue of her property whatsoever and wheresoever (in the events which happened)

equally amongst her four daughters and her son William, and directed that the share of her daughter Williamina should be for her separate use, the income thereof to be paid to her for life without power of anticipation, and after her decease to her children who should attain twenty-one or marriage and in such manner as she should appoint, "and if she shall die without issue who shall live to take a vested interest her share to go to her next of kin as if she had not been married."

The testatrix died in 1864 and her will was proved by the executors.

The testatrix left her surviving four daughters, namely, Rosdew Mary, Jane Isabella, Katherine Mary, and Williamina Caroline, and a son William.

In June, 1866, Jane Isabella Mudge married Robert Martin, and their marriage settlement contained the following clause:— "And it is hereby agreed and declared that if the said Jane Isabella Mudge now is, or if during the said intended coverture she or the said Robert Martin in her right at one and the same time and from one and the same source shall become, seised or possessed of or entitled to any real or personal property of the value of 50*l.* and upwards for any estate or interest whatsoever in possession, reversion, remainder or expectancy" (except jewels, &c.) "then and in every such case the said Robert Martin and Jane Isabella Mudge and all other necessary parties shall at the cost of the said trust estate" convey the said real and personal property to or otherwise cause the same to be vested in the said trustees or trustee.

Robert Martin died in 1871.

Katherine Mary Mudge died unmarried in 1876.

William Mudge died unmarried in 1892.

Rosdew Mary Mudge died unmarried in 1899.

Williamina Mudge married Edwin Selby in July, 1865. She survived her husband and died in December, 1912, without issue, leaving her sister the said Jane Isabella Martin her sole next of kin.

Part of the share of Williamina Selby in the residuary estate of the said testatrix was represented by a sum of 1189*l.* 9*s.* 5*d.* India 3½ per cent. Stock in Court, and Jane Isabella Martin now

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petitioned for payment out of that sum to herself on the ground that it was not caught by the covenant in her marriage settlement to settle her after-acquired property.

Iselin, for the petitioner. The question turns on the words "if the said Jane Isabella Mudge now is . . . . entitled to any real or personal property of the value of 50*l.* and upwards for any estate or interest whatsoever in . . . . expectancy." It is submitted that the gift in the will to the next of kin of Williamina was a contingent gift to an artificial class, no member of which could be ascertained until the event happened, and that the hope Jane Isabella Mudge had at her marriage of becoming one of that class was not an "interest in expectancy" within the meaning of her covenant. It was a mere spes successionis, a hope of becoming one of the class. It was not an interest in expectancy in respect of any property: *In re Parsons* (1); *In re Ellenborough* (2); *In re Simpson* (3); *In re Green.* (4) But if it was an expectancy, her then interest was only one fourth of the share, and therefore only one fourth of the fund in Court should go to the trustees and she is entitled to the other three fourths.

A. L. Morris, for the trustees of the marriage settlement. This was an "interest in expectancy" within the meaning of the covenant, the wording of which is somewhat different to that of the covenants in the cases cited. *In re Green* (4) was a decision on a particular statute. At the date of her marriage, the lady was one of a contingent class who were cestuis que trust under the bequest in her mother's will: *Paul* v. *Paul.* (5) She had a definite interest as one of that class and it was competent for her to contract to settle that interest, although it was contingent, and the whole of it when it fell in was caught by the covenant.

Iselin in reply.

NEVILLE J. At the date of her marriage the petitioner was one of the next of kin of a lady who had then no children and who was entitled under the will of a testatrix to a life interest in a share of the testatrix's residuary estate with a gift over in default of

(1) (1890) 45 Ch. D. 51.
(2) [1903] 1 Ch. 697.
(3) [1904] 1 Ch. 1.
(4) [1911] 2 Ch. 275.
(5) (1882) 20 Ch. D. 742.

issue to her next of kin. Under the will there was an express gift, which no doubt was contingent, to the next of kin as a class, but still the petitioner as one of such next of kin was a cestui que trust under that gift and could have prevented any improper dealings with the trust fund. Now is a contingent interest of that kind an "interest in expectancy" within the covenant? If it is not, I do not see to what property or interest the words can apply. I think this case differs from the expectancy which was dealt with by the Court of Appeal in *In re Simpson* (1) and by Warrington J. in *In re Green* (2), and which was a mere spes successionis. Here under the will there was a contingent gift to a class, of whom the petitioner was one, and I think that the benefit she took under that gift was an "interest in expectancy" to which she was entitled at the date of her marriage and which was caught by the covenant in her settlement. I hold therefore that the trustees of her settlement are entitled to the whole of the fund in Court. I can draw no distinction between a fourth of the fund and the whole of it.

Solicitors: *J. Child; Coote & Richards.*

(1) [1904] 1 Ch. 1. (2) [1911] 2 Ch. 275.

H. L. F.

SARGANT J.
1913
March 12, 19.

STAMFORD, SPALDING AND BOSTON BANKING COMPANY *v.* KEEBLE.

[1912 S. 1602.]

Mortgage—Foreclosure Proceedings—Licence by Mortgagees to work Peat—Jurisdiction of Court to sanction—Conveyancing and Law of Property Act, 1881 (44 *& 45 Vict. c.* 41), *s.* 25, *sub-s.* 2.

Mortgagees of land, which was in the possession of a receiver appointed by the Court in foreclosure proceedings, applied to the Court before any foreclosure order had been made to sanction an exclusive licence for a term of years, and at a premium and royalties, to work deposits of peat on the mortgaged land :—

Held, that the Court had no power to sanction the licence.

Quære, whether s. 48 of the Chancery Amendment Act, 1852, s. 25 of the Conveyancing Act, 1881, s. 13 of the Law of Property Amendment Act, 1859, s. 2 of the Confirmation of Sales Act, 1862, and s. 44 of the Trustee Act, 1893 (as amended by s. 3 of the Trustee Act, 1893, Amendment Act, 1894), raise the necessary implication that the sales of minerals apart from the land and other sales therein referred to could not, apart from those provisions, have been ordered by the Court in proceedings for foreclosure or sale.

The defendants, Arthur James Keeble and Arthur Cecil Keeble, were the owners of the Wissington Estate in the county of Norfolk, subject to certain mortgages to the Stamford, Spalding and Boston Banking Company, Limited, which had sold its business and sub-mortgaged the property to Barclay & Co., Limited, and was in process of being wound up voluntarily.

The two banks commenced proceedings against the defendants by originating summons to enforce their mortgages by foreclosure or sale, and also brought an action against Arthur James Keeble in the King's Bench Division to recover a sum of about 350,000*l.* The defendant in that action had delivered a counter-claim alleging that part of the debt claimed was in respect of a guarantee improperly obtained, and the issues in that action were going to be tried by a jury.

In the foreclosure proceedings a receiver had been appointed, and an order had been made for delivery to the receiver of possession of part of the property which had been allowed to

remain in the defendants' possession at an occupation rent, but no order for foreclosure had been made.

The Wissington Estate contained about 7000 acres and contained valuable deposits of peat which had become available for the extraction of sulphate of ammonia by a new process.

The plaintiffs applied by summons in the foreclosure action for liberty to accept an offer from a syndicate to take a licence to work all mineral peat upon the estate upon certain terms as to premium and royalties, and that all necessary parties might be directed to execute a proper licence to be approved by the judge.

The summons was adjourned into Court and heard on March 12, 1913.

T. J. C. Tomlin, in support of the summons. The value of the peat deposits is not in dispute. The new process has been worked commercially outside this country. The offer of the syndicate is a beneficial one, as, apart from the peat, the land is of little value. The working of the deposits is practically the only security which the mortgagees have for their money. The application is not for a sale or a lease, but for something that partakes of both—a sale by instalments. The nearest thing to what is asked for is a lease of mines. In proceedings for foreclosure the Court, on the request of the mortgagee, without allowing any time for redemption or for payment of any mortgage money, may direct a sale of the mortgaged property, on such terms as it thinks fit: Conveyancing Act, 1881, s. 25, sub-s. 2.

The Court has a general jurisdiction as to allowing leases of mortgaged property. In Seton on Judgments, 7th ed. p. 769, there is the following passage: "The power of a receiver to grant leases is limited to such parol leases as are authorized by the Statute of Frauds (29 Car. II. c. 2), s. 2; Kerr, 205, 206; but in an ordinary case a receiver may, without applying for the sanction of the judge, let for a year certain, or less, or for any term not exceeding three years: *Shuff* v. *Holdaway*, M.R., in Chambers, 27 March, 1863, Dan. 1443." That statement has not

SARGANT J. 1913 STAMFORD, SPALDING AND BOSTON BANKING COMPANY v. KEEBLE.

been accepted by the Court of Appeal, which has laid it down that no lease can be granted by a receiver without the sanction of the Court; but the Court can approve the granting of any lease which it considers necessary for the protection of or making fruitful the mortgaged property.

The defendants carry on the new process in buildings on the estate, and, as the security is not only on the land, but on the business of extracting sulphate of ammonia from peat, the mortgagees are entitled to the appointment not only of a receiver, but to a manager of the business, and to have the business carried on: *County of Gloucester Bank* v. *Rudry Merthyr Steam and House Coal Colliery Co.* (1); *Campbell* v. *Lloyd's, Barnett's, and Bosanquet's Bank.* (2)

Buckmaster, K.C., and *Willoughby Williams*, for the defendants. The Court has no power to make the order asked for; and if it had, such an order would not be the best method of dealing with the estate. What the mortgagees want is the sanction of the Court to a lease for a number of years which will enable the lessees to cut away and remove the surface to the depth of seven feet. A mortgagee, until foreclosure or sale, has certain well-established rights which the Court cannot interfere with except by doing things required for the salvage or protection of the mortgaged property. The Conveyancing Act, 1881, does not empower the granting of mining leases or selling minerals, and the Court cannot authorize a mortgagee to sell something which is not referred to in the Act. Sect. 44 of the Trustee Act, 1893, empowers trustees with a power of selling land, and with the sanction of the Court, to sell land with a reservation of the minerals, but that is not what these mortgagees are asking for. Sect. 4 of the Conveyancing Act, 1911, gives power to a mortgagee to sell mines and minerals apart from the surface of the mortgaged property, but the section only applies where the mortgage was executed after the commencement of the Act, namely, January 1, 1912; and even if the section applied to the defendants' mortgages, such a licence as is asked for would not be within the section.

The so-called business consists only of experimental works.

(1) [1895] 1 Ch. 629. (2) (1889) [1891] 1 Ch. 136, n.

Maugham, for the proposed licensees, did not address the Court.

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1913
STAMFORD, SPALDING AND BOSTON BANKING COMPANY v. KEEBLE.

Cur. adv. vult.

March 19. SARGANT J. In this case the Stamford, Spalding and Boston Banking Company, Limited, who are in liquidation and acting through their liquidators, and Barclay & Co., Limited, who have taken over the business of the Stamford Bank and are sub-mortgagees of theirs, are seeking, by means of proceedings by way of originating summons against the defendants, Arthur James Keeble and Arthur Cecil Keeble, the enforcement, by foreclosure or sale, of various mortgages on certain lands in Norfolk, which, or large parts whereof, are comprehensively known and hereinafter referred to as the Wissington Estate. It is common ground between the parties that the Wissington Estate comprises some 7000 acres, that it is mainly valuable, and indeed was purchased by the defendants or one of them, because it contains valuable deposits of peat, which have become available for the extraction of sulphate of ammonia by means of a recently discovered process.

The litigation between the parties has not been limited to the comparatively friendly proceedings usual under an originating summons of this description. The plaintiffs have also attempted to obtain personal judgment against the defendant Arthur James Keeble in the King's Bench Division for a sum of nearly 350,000*l.* To this he has replied by a counter-claim alleging that a large part of the debt claimed by the plaintiffs was in respect of a guarantee obtained by fraud or undue influence, or is otherwise open to objection; and the issues raised by that counter-claim are going to be submitted to a jury. In the meantime, however, though it is impossible to obtain a workable foreclosure decree until the issues just mentioned have been determined, a considerable amount of the mortgage debt, which is stated to amount to nearly 380,000*l.* in the whole, must in any event be due; and by an order made in the foreclosure proceedings on May 24, 1912, a receiver has been appointed of the Wissington Estate; and by a subsequent order, later in the same year, possession was ordered to be delivered up to the receiver of part of the

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STAMFORD, SPALDING AND BOSTON BANKING COMPANY v. KEEBLE.

property of which the defendants or one of them had been allowed to remain in possession at an occupation rent.

The plaintiffs, the Stamford Bank and Barclay's Bank, are now applying in the foreclosure proceedings that they may be at liberty to accept an offer from the San Sebastian Development Syndicate, Limited, contained in a letter of October 25, 1912, and an agreement of January 21, 1913. This offer is in effect an offer to take an exclusive licence to work all mineral peat on the Wissington Estate for fifty years, at a royalty of 6*d.* per ton, with a minimum royalty of 4000*l.* per annum. There are also special terms as to commutation of future royalties, as to the payment of a large premium, as to a power to the lessee or licensee to surrender, and so on. But these are of little moment for the present purpose, particularly in view of the very broad ground on which the question has been argued before me.

The objection of the defendants to the proposed arrangement or to any arrangement of the like character is twofold, namely, first, that the Court has no power to force any such arrangement on the defendants as mortgagors, and secondly, that on the merits the proposed arrangement is not a beneficial one. At the request of the parties I allowed this first objection to be argued entirely separately from the second, and more or less on the footing of a demurrer; that is to say, on the assumption that the proposed arrangement was in fact the best method of working the property from a commercial point of view. And it is on this assumption that I am now determining the first objection.

The law on this point rests partly on the settled practice of the old Court of Chancery and partly on more recent statutory enactment. Before the passing of the Chancery Amendment Act it was the well settled rule of the Court that a mortgagee could not in general obtain a sale of the mortgaged estate, except in such cases as those of a dry reversion or an advowson (Spence's Equitable Jurisdiction, vol. ii. pp. 677, 678). By the Chancery Amendment Act, 15 & 16 Vict. c. 86, s. 48, the Court was for the first time given general power in foreclosure actions to direct a sale of the property on such terms as the Court might think fit. This section was repealed by the Conveyancing and Law of Property Act, 1881, but re-enacted by s. 25 thereof in wider terms, and so

as to apply not only to foreclosure actions but also to certain other actions. There may be some question whether these sections entitled the Court to direct a sale of minerals apart from surface or vice versa; but I should hesitate long before deciding that any such fetter was imposed on the discretion of the Court. The cases of a trustee for sale or of a mortgagee exercising a power of sale out of Court are obviously quite different. And the fact that it was necessary to give express powers to mortgagees, with the sanction of the Court, to sell land apart from timber (22 & 23 Vict. c. 35, s. 13), or to sell the surface apart from minerals (25 & 26 Vict. c. 108, s. 2; Trustee Act, 1893, s. 44, as amended by s. 3 of the Amendment Act of 1894), does not in my opinion necessarily imply that such a sale could not, apart from those Acts, have been ordered by the Court in proceedings for foreclosure or sale. But it is not necessary to decide the point in the present case.

It has been urged before me by Mr. Tomlin with much force that the arrangement proposed is in the nature of a sale by instalments of part of the land, namely, the peat surface, and that the Court is entitled to realize to the best advantage, as would be the case if the present proposal went through. But on the whole I have felt unable to accede to these arguments. I think that in matters of this kind the Court cannot, at the present day, depart from or exceed the rules as to realization which have been definitely fixed by settled practice, except so far as such departure or excess may have been authorized by statute. To vary in this way the well-settled consequences of mortgage transactions would, in effect, be to introduce new terms into the bargain between the contracting parties. And, as regards the legislation to which reference has been made, I cannot think that, however great the similarity between the arrangement now proposed and a series of deferred sales, this legislation can be fairly regarded as authorizing, under the name of sales, mining leases or transactions of a similar nature. Such leases are a well known form of contract and are dealt with in legislation of this character, such, for instance, as the Conveyancing and Law of Property Act, 1881, together with occupation leases and building leases, and altogether apart from sales, and no power to grant mining leases

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is given by that statute. If it had been intended to give authority to realize mortgaged property in this way, it is to be presumed that the power would have been given in distinct terms.

It has not been contended before me that the mortgagees have, apart from the Court, any power to grant a lease or licence of the kind proposed, and indeed the objections to any such contention are apparent. And apart from all other objections the provisions, as to sale, of s. 4, sub-s. 1 (ii.), of the Conveyancing Act, 1911 (1 & 2 Geo. 5, c. 37), are inapplicable here, because the mortgages are prior to the operation of that Act.

A good deal of argument was founded on the fact that experimental works had already been started by the mortgagors, and it was sought to be inferred that the security of the mortgagees was not only the land itself, but the business of extracting sulphate of ammonia from peat, and they would, for instance, be entitled not only to a receiver, but to a manager. Having regard to the experimental character of these works, the suggested inference seems to me an extremely doubtful one. It is one thing to carry on such works, and an altogether different thing to start large new works on a commercial basis. But, however this may be, the proposal before the Court is not to carry on any business, but to let the property upon terms under which the business will be carried on by the lessees. And therefore this branch of the argument may, in my opinion, be disregarded.

On the whole, therefore, I have come to the conclusion that the Court has no power to sanction any such lease or licence as proposed, and that the present application must fail on the first of the two objections which have been taken to it. But this will in all probability only result in a certain measure of delay, since, unless the plaintiffs fail to establish their mortgage debts or are paid off, they will ultimately become entitled to the Wissington Estate by foreclosure, and can then deal with it as they please.

I have felt some difficulty as to costs. The plaintiffs have failed, but the application was one directed to the benefit of the estate, and the point was a fairly arguable one. In such cases mortgagees may be, and have in some cases, been allowed their costs by way of addition to their security. But I will not go as

far in their favour in this case. It seems to me that the case is one in which there should be no order as to costs.

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Solicitors for plaintiffs: *Coward & Hawksley, Sons & Chance.*
Solicitor for defendants: *C. F. Ingram.*
Solicitors for proposed licensees: *Munns & Longden.*

F. E.

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[00437 of 1910.]

J. J. KING & SONS' (LIMITED) CASE.

OLD SILKSTONE COLLIERIES' (LIMITED) CASE.

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1912
NEVILLE J.
Nov. 27, 28; *Dec.* 10.
1913
C. A.
April 2, 3, 4; *May* 7.

Insurance Company — Winding-up — Current Policies—Employers' Liability Policies — Contingent Liabilities — Contingent Claims maturing after Winding-up Order—Proofs—"Valuing a policy"—Breach of Contract—Measure of Damages—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *ss.* 206, 207, 208—*Assurance Companies Act,* 1909 (9 *Edw.* 7, *c.* 49), *ss.* 1, 17; *Sched. VI.*

A policy-holder who is insured against risks under the Employers' Liability Act, 1880, and the Workmen's Compensation Acts, 1897 to 1906, may prove in the liquidation of the insurance company (1.) for ascertained amounts due at the date of the winding-up order from the company to the assured under the policy; (2.) for liabilities in the shape of weekly payments which had emerged before the date of the winding-up order, such weekly payments to be valued according to the rule prescribed by Sched. VI. (D) to the Assurance Companies Act, 1909; and (3.) for the value of the policy as a contract of indemnity in respect of the risk of fresh liabilities emerging after the date of the winding-up and during the unexpired period of the policy, such valuation to take place as at the date of the winding-up order, not on the basis of an estimate of the contingencies, but upon the basis of a partial return of premium. He is not entitled to prove in addition in respect of liabilities which may have emerged under the policy between the date of the winding-up order and the date of proving.

So *held* by Cozens-Hardy M.R. and Kennedy L.J. (Buckley L.J. dissenting).

Decision of Neville J. reversed.

Held by Neville J. (whose decision on this point was not appealed from), that the policy-holder in such a case is not entitled to prove by

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way of damages for the difference between the estimated cost of re-insuring the same risks for the same period in another office and the amount of premiums he would have paid under his policy.

The principle of *Macfarlane's Claim* (1880) 17 Ch. D. 337, not adopted.

The opinion of the Lord Ordinary (Lord Cullen) in the Court of Session in Scotland in *In re Life and Health Assurance Association, Ld., Berry's Claim* (p. 137, post), approved.

ADJOURNED SUMMONS.

These were two representative cases to determine the principles on which holders of employers' liability policies, issued by the above-named corporation and current at the date of its winding-up, were to be admitted to prove against the assets of the corporation.

On December 20, 1910, a compulsory winding-up order was made against the corporation on a petition presented on December 8, 1910. The company was insolvent.

J. J. KING & SONS' (LIMITED) CASE.

In this case the company, who carried on the business of ship breakers and dismantlers, were the holders of a policy, No. 9017, dated June 24, 1909, for one year from July 1, 1909, at one annual premium of 147*l.* 16*s.* 3*d.* on an estimated amount of 6150*l.* for wages, salaries, &c.; and by the policy it was agreed that if at any time during the said period of one year and during the continuance of the policy by renewal "any employee in the insured's immediate service shall sustain any personal injury by accident or disease as described in the Third Schedule to the Workmen's Compensation Act, 1906, while engaged in the service of the insured in work forming part of or process in the business above mentioned, and in case the insured shall be liable to make compensation for such injury either under the Fatal Accidents Act, 1846; the Employers' Liability Act, 1880; the Workmen's Compensation Acts, 1897, 1900 and 1906; or at common law; the corporation shall indemnify the insured against all sums for which the insured shall be so liable."

This policy was renewed on July 1, 1910, for one year, so that it was current at the date of the winding-up and expired on July 1, 1911.

On October 4, 1911, the company lodged a proof in the liquidation under their policy in which they claimed three sums of 441*l.* 18*s.*, 328*l.*, and 661*l.* The 441*l.* 18*s.* was in respect of an accident which occurred in June, 1910, to a workman in their employ named McNeill. The other two sums were also in respect of accidents, both of which occurred in March, 1911, to workmen in their employ named Foulkes and Smith respectively. In each case the sum claimed was the estimated amount required to purchase an annuity equivalent to the weekly compensation that had been awarded to the workman in the county court.

The liquidator rejected the proof on the ground that the company were only entitled to prove for the proportionate amount of the premium between the date of the winding-up and the date of the expiry of the policy. The company took out a summons to reverse his decision.

THE OLD SILKSTONE COLLIERIES' (LIMITED) CASE.

In this case the colliery on January 28, 1911, lodged a proof in the liquidation based on three policies numbered 504,255, 505,061, and 6601 respectively.

Policies Nos. 504,255 and 505,061 were insurances against accidents to workmen in the employ of the colliery similar in terms to the policy held by J. J. King & Sons, Limited.

Policy No. 505,061 was dated August 25, 1910, at one annual premium of 26*l.* 17*s.* 6*d.* for one year from August 19, 1910, and expired on August 18, 1911.

Policy No. 504,255 was dated June 13, 1910, and was for one year "from August 1, 1910, to July 31, 1911, both dates inclusive, and in addition see endorsement for period of further two years." The following memorandum, dated June 13, 1910, and signed by the managing director of the corporation, was indorsed on the policy:—"It is hereby declared and agreed that the insured shall renew and the corporation shall accept the assurance under this policy for a period of three years commencing on the first day of August, 1910." The annual premium under this policy was 2154*l.* 7*s.* 6*d.*, payable quarterly in advance, on an estimated amount of 140,000*l.* for wages, salaries, &c.; and the policy was

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current at the winding-up, the last quarterly payment of the premium having been made in November, 1910.

On January 28, 1911, the colliery lodged a proof in the liquidation in which they claimed (inter alia)—

(1.) 215*l.* 3*s.* 6*d.* for proportionate amount of unexpired premiums in respect of policies Nos. 504,255 and 505,061.

(2.) 4459*l.* 0*s.* 11*d.*, estimated liability in respect of claims in connection with accidents that had arisen prior to December 20, 1910, under the same two policies and a third expired policy No. 6601. But this sum included a claim in respect of an accident that occurred on January 11, 1911, under policy No. 504,255.

(3.) 10,469*l.* 6*s.* 9*d.* for damages and loss sustained by breach of contract by the corporation (*a*) over the unexpired period of policy 504,255 from December 20, 1910, to July 31, 1913, and (*b*) over the unexpired period of policy 505,061 from December 20, 1910, to August 18, 1911. The damages were the estimated difference between the rates the colliery would have to pay for re-insuring the same risks for the same periods in a good office and the rates they would have paid the corporation under the said two policies. There was evidence that the rates of insurance had risen very considerably.

The liquidator rejected the proof on the ground (inter alia) that the colliery were not entitled to prove for damages sustained by breach of contract, and the colliery issued a summons to reverse his decision. After the summons was taken out the colliery joined the Yorkshire Coal Owners' Mutual Indemnity Company, Limited, and paid to that company sums on account of risks incurred, and it was conceded that, if the claim for damages could be sustained, the amount of the damages claimed would have to be readjusted.

By arrangement the two summonses were taken together. They came on for hearing before Neville J. on November 27, 1912.

D. M. Kerly, for J. J. King & Sons, Limited. It is not disputed now that the claim in respect of the accident to McNeill, which occurred before the winding-up, must be admitted. But with

respect to the rest of the proof it is said that all that the company can get is the proportionate amount of the unexpired premiums. The question turns on the Assurance Companies Act, 1909. Apart from that Act and under the contract of insurance in the policies these losses which accrued after the winding-up are claims which under the general law could have been proved for. They are contingent claims or liabilities of which under ss. 206 and 207 of the Companies (Consolidation) Act, 1908, a just estimate is to be made according to the rules in bankruptcy, and there is no time fixed at which the valuation is to be made: *In re Dodds.* (1) There is no direct authority, but in the case of a fire policy a claim for a loss which arose after the winding-up was allowed in *Macfarlane's Claim.* (2) It is submitted that the same principle applies here, and that the date for fixing the value of a contingent claim is not the date of the liquidation but when the claim matures. Then the Act of 1909 defines (s. 1) the companies to which the Act applies, and s. 17 directs that the value of a policy shall be estimated as provided by the Sixth Schedule. (3) Sect. 17 only deals with policies and liabilities requiring to be valued and does not deal with the right of proof generally. There is nothing in s. 17 and the schedule which fixes the date for valuing a policy or excludes a claim for a contingent liability that has matured and ripened into a debt after the liquidation under a current policy. Clause (B) in the schedule supports this view. We claim (1.) the value of the policy to be ascertained under Sched. VI. by allotting to it the proportionate amount of the unexpired premium; and (2.) the value of the liability which was contingent at the date of the winding-up and has since matured and is represented by the two sums of 661*l.* and 328*l.* Alternatively, it is submitted that the policy is not a policy "requiring to be valued" unless it is valued in the way we claim, because the event has happened and the amount due under the policy is ascertained. Therefore so far as our claim is for an ascertained sum it is no part of a policy that requires to be valued.

Younger, K.C., and *Maugham*, for the liquidator. The real

(1) (1890) 25 Q. B. D. 529, 534. (2) 17 Ch. D. 337, 341.
(3) See note on p. 113, post

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question is whether the principle of *Macfarlane's Claim* (1) applies to insurance companies since the Assurance Companies Act, 1909. It is submitted that it does not, and that the Sixth and Seventh Schedules to the Act of 1909 are a complete code of rules for valuing policies in the winding-up of each class of insurance companies to which the Act applies, and that the time for estimating the value is the date of the winding-up order. Our case is that those schedules are in substitution for the provisions of s. 158 of the Companies Act, 1862, which is reproduced in s. 206 of the Companies (Consolidation) Act, 1908, and that the bankruptcy rules imported into the winding-up of insolvent companies by s. 10 of the Judicature Act, 1875, and s. 207 of the Companies (Consolidation) Act, 1908, by necessary implication do not apply to insurance companies, having regard to the mode in which these policies are to be valued under Sched. VI. The principles on which the current policies of a life insurance company in liquidation were to be valued were considered in *Bell's Case* (2), where James V.-C. held that the policy-holder was entitled to prove for the difference between the increased rate which the policy-holder would have to pay for insuring the same risks for the same period in a good office and the premium paid to the company in liquidation. But Lord Cairns when arbitrator in the Albert Arbitration in *Lancaster's Case* (3) dissented from that view and held that the proof should be for a sum to be ascertained at the date of the winding-up order and should be the difference between the present value of the reversion in the sum assured at the decease of the life and the present value of the future premiums. Then Lord Romilly in *Holdich's Case* (4) discussed *Bell's Case* (2) and *Lancaster's Case* (3) and followed *Bell's Case*. (2) This difference of opinion was put an end to by the Legislature adopting Lord Cairns' opinion in s. 5 of the Life Assurance Companies Act, 1872, and the First Schedule thereto, and that has since been the law as to life insurance companies. Then the Employers' Liability Insurance Companies Act, 1907, applied the provisions of the Life Assurance Companies Acts, 1870 to 1872, to companies carrying on the business of employers' liability insurance. Then

(1) 17 Ch. D. 337.
(2) (1870) L. R. 9 Eq. 706.
(3) (1871) L. R. 14 Eq. 72, n.
(4) (1872) L. R. 14 Eq. 72, 78—80.

the Assurance Companies Act, 1909, repeals the Life Assurance Companies Acts, 1870 to 1872, and the Act of 1909, under ss. 1, 17, and Sched. VI., reproduces as respects life insurance policies s. 5 of the Act of 1872 and the rules in Sched. I. thereto, and extends and applies those rules to every class of insurance company subject to the Act, whether solvent or insolvent. The rules for valuing policies and liabilities are the method of valuing a claim that has accrued before the winding-up. There is no direct authority, but the law of England and Scotland is the same as to contingent claims in the winding-up of an insurance company, and in the Court of Session in Scotland in a recent unreported case of *In re Life and Health Assurance Association, Ld., Berry's Claim* (1), in which the facts were very similar to the present case, the Lord Ordinary (Lord Cullen) held that a policy-holder was not entitled to prove in respect of a contingent claim that had matured after the winding-up, but was limited to the proportionate amount of the unexpired portion of the premium. We submit his opinion is correct and we ask this Court to follow it. It is to be observed also that s. 18 of the Act of 1909 reproduces s. 22 of the Act of 1870, and it has been held that, in a scheme for reduction of contracts, the date at which contracts are to be ascertained is the date of the winding-up order: *In re Great Britain Mutual Life Assurance Society.* (2) We submit, therefore, that Sched. VI. is a complete code for valuing a policy and liability, and stops all damages, that the value is to be ascertained at the date of the winding-up order, and that a proof for a contingent liability that afterwards matures is excluded. The arguments we have advanced also meet some of the points raised by the proof of the Old Silkstone Collieries, Limited.

D. M. Kerly in reply. My proof is good unless my rights have been expressly taken away by the Act of 1909. But a life policy is distinct from an employers' liability policy. Under a life policy there can be but one claim when the life drops, but under an employers' liability policy there may be repeated claims in respect of accidents during the currency of the policy. *Berry's Claim* (1) was decided under the Employers' Liability

(1) See p. 137, post. (2) (1882) 20 Ch. D. 351.

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Assurance Companies Act, 1907, but that Act is repealed and its provisions are not expressly re-enacted by the Act of 1909.

Tomlin (*Hon. Frank Russell, K.C.*, with him), for the colliery company. On the first part of our proof we adopt the arguments of Mr. Kerly. With regard to the third item—the damages—we submit we can prove for damages for breach of the agreement to extend policy No. 504,255 to July, 1913. The memorandum indorsed on the policy was an obligatory contract, on the assured to renew and pay premiums and on the corporation to keep us insured, and the measure of damages is indicated in *Bell's Case* (1) and *Holdich's Case.* (2) That was the existing law, which still exists unless it is expressly taken away. *Lancaster's Case* (3) was not a decision, but the opinion of Lord Cairns as an arbitrator. The Life Assurance Companies Act, 1872, adopted the rule of Lord Cairns and applied it only to life policies, and then the Act of 1907 extended the rule to insurance policies under the Workmen's Compensation Acts, and s. 17 of the Act of 1909 merely replaces that provision, but does not say that the old law shall not apply to claims under employers' liability policies. All that the section says is that where a policy is to be valued it shall be valued in a particular way, but it does not expressly take away the right to prove for damages under the old law. It may be that we can elect and take either the value of the policy or prove for the damages sustained. If we prove for the value, we are bound to take the valuation provided by the Act, but no such valuation is required for damages if we elect to prove for them. General words in an Act do not take away definite existing rights.

Maugham (*Younger, K.C.*, with him), for the liquidator. If Mr. Tomlin is right, all the elaborate rules in Sched. VI. are of no use, and in nearly every case a policy-holder would get more than the return of his premiums. But s. 17 gives him no option and he has no alternative rights. Whatever his claim may be, under s. 206 of the Act of 1908 a just estimate is to be made of its value, and by s. 17 the value is to be ascertained in manner provided by Sched. VI. An agreement to extend a policy is

(1) L. R. 9 Eq. 706. (2) L. R. 14 Eq. 72.
(3) L. R. 14 Eq. 72, n.

not a policy, and moreover no premium was paid under the agreement. There can be no claim on the footing that a policy is current in a case where the policy is conditional on the payment of premiums, and such premiums have not in fact been paid.

Tomlin in reply.

Cur. adv. vult.

1912. Dec. 10. NEVILLE J. In my opinion a policy-holder holding a policy current at the date of the winding-up of a company in liquidation may prove for any amount due to him under the contract of insurance in respect of any loss which has occurred at the date of the winding-up or at any subsequent date prior to the proof, or if no loss has occurred since the date of the winding-up he may prove upon the policy as for a contingent claim. If he has not so proved, or if he is allowed to withdraw any such proof, he may, I think, in the case of an insolvent company prove at any time during the winding-up for the amount due upon any loss occurring subsequent to the winding-up without disturbing previous dividends. In the case of a solvent company his rights can hardly be less: see *Gooch* v. *London Banking Association* (1), *Lord Elphinstone* v. *Monkland Iron and Coal Co.* (2), and *Craig's Claim.* (3) Such proofs must be, I think, upon the footing of liability to pay all premiums due up to the date of the loss. These premiums will, I think, go in reduction of the amount of the proof, the damages being the amount of the liability insured against less the premiums which would have to be paid by the insured.

So far I have considered the matter without reference to s. 17 of the Assurance Companies Act, 1909. [His Lordship read the section and the Sixth Schedule, and continued:] I cannot find anything in the Act of 1909 inconsistent with the decision in *Macfarlane's Claim.* (4) I gather from that decision that, whether the rules of bankruptcy apply or not, while it is open to the insured to prove at all he may prove for a claim that has ripened into a liability after the date of the winding-up. The Act does

(1) (1886) 32 Ch. D. 41.
(2) (1886) 11 App. Cas. 332.
(3) [1895] 1 Ch. 267, 276.
(4) 17 Ch. D. 337.

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not expressly deprive the insured of any existing right, but merely directs that in the case of a policy requiring to be valued it shall be valued in a particular way. If the Act means that the valuation in the manner prescribed is to be universal it would apply equally to the case of the voluntary winding-up of a solvent company, in which case a solvent company would be able to free itself from all future liability under its policies by returning to the policy-holders the proportions of premiums unexhausted at the date of the winding-up. It appears to me that confusion has been caused by the use of the words "value of a policy," which, with all respect to the eminent persons who have employed the phrase, seem to me an inaccurate description of that for which a policy-holder is entitled to prove in a winding-up. In my opinion he may prove for a debt which has arisen under the contract of insurance, whether it has arisen before or after the winding-up, while he may also treat the winding-up as a repudiation of the contract by the company and prove for the estimated loss or damage thereby occasioned to him. This is in the nature of a contingent claim in regard to which under s. 206 a just estimate must be made so far as possible of the value. It is this estimate of the value of the claim which in my opinion is meant by the Act of 1909 as the value of the policy, and it is by s. 17 enacted that it shall be made in a particular way. I have read Lord Cullen's opinion in *Berry's Claim* (1) with great attention and should have been glad to follow it had I thought it permissible in that way to avoid the responsibility of a decision upon what is certainly a difficult question, but in my view an English judge is bound to give effect in the matters which come before him to his own opinion even when it should unfortunately differ from that expressed by the Scottish and Irish Courts upon a similar question. In construing an Act of Parliament I think the Courts are not entitled to inquire further into the intentions of the Legislature than is revealed by the words of the statute and the inferences necessarily to be drawn from them. In the statute under consideration the rights of proof by policy-holders are not expressly dealt with, and I think that the inference that the Legislature intended to confine all proofs by policy-holders to a valuation of

(1) See p. 137, post.

the policy is not necessary and therefore not legitimate. It is, I think, obvious from what I have stated above that in my opinion policy-holders are entitled to prove in respect of (i.) obligations presently incurred under the contract of assurance at the date of the winding-up; (ii.) obligations presently incurred under the contract of assurance since the date of the winding-up; (iii.) estimated loss incurred by the policy-holder by the repudiation of the contract of insurance. This loss (iii.) is limited by the Act to the proportion of the premium unexhausted and cannot be combined with proof (ii.). By necessary implication I think the proof in respect of weekly payments is to be ascertained in the manner directed in the Act with regard to the valuation of a policy. With these directions I must send back the proofs to the liquidator for reconsideration. I give the costs of each summons out of the assets to be paid and retained by the liquidator, and the rest of the summonses will stand over with liberty to apply.

NOTE.—The Assurance Companies Act, 1909, enacts:—

Sect. 17. "(1.) Where an assurance company is being wound up by the Court, or subject to the supervision of the Court, or voluntarily, the value of a policy of any class or of a liability under such a policy requiring to be valued in such winding-up shall be estimated in manner applicable to policies and liabilities of that class provided by the Sixth Schedule to this Act."

(2.) provides that the rules in the Sixth and Seventh Schedules to the Act shall be of the same force as if they were rules made in pursuance of s. 238 of the Companies (Consolidation) Act, 1908.

"SIXTH SCHEDULE.

"RULES FOR VALUING POLICIES AND LIABILITIES.

"(A)—*As respects Life Policies and Annuities.*

. . . . .

"(B)—*As respects Fire Policies.*

"*Rule for valuing a Policy.*

"The value of a current policy shall be such portion of the last premium paid as is proportionate to the unexpired portion of the period in respect of which the premium was paid.

"(C)—*As respects Accident Policies.*

. . .

"(D)—*As respects Employers Liability Policies.*

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"*Rule for valuing a Weekly Payment.*

"The present value of a weekly payment shall, if the incapacity of the workman in respect of which it is payable is total permanent incapacity, be such an amount as would, if invested in the purchase of an immediate life annuity . . . . purchase an annuity for the workman equal to 75 per cent. of the annual value of the weekly payment, and in any other case shall be such proportion of such amount as may, under the circumstances of the case, be proper.

"*Rule for valuing a Policy.*

"The value of a current policy shall be such portion of the last premium paid as is proportionate to the unexpired portion of the period in respect of which the premium was paid, together with, in the case of a policy under which any weekly payment is payable, the present value of that weekly payment.

"(E)—*As respects Bonds or Certificates.*

. . . . ."

H. L. F.

From this decision the liquidator in the case of J. J. King & Sons, Limited, appealed. The appeal came on for hearing on April 2, 1913.

Younger, K.C., and *Maugham*, for the appellant. The principle of *Macfarlane's Claim* (1) does not apply to insurance companies since the Assurance Companies Act, 1909. Under that Act and the Sixth and Seventh Schedules there is now a complete code of rules for valuing employers' liability policies in a winding-up. The time for estimating the value is the date of the winding-up order. [They substantially repeated the arguments advanced by them in the Court below.]

Hon. Frank Russell, K.C., and *D. M. Kerly*, for the respondents. In order to succeed in this appeal the appellant must establish that Scheds. VI. and VII. constitute an exhaustive code in substitution for all pre-existing rights of proof in a policy-holder. Before the Act of 1909 he was entitled to prove in respect of loss sustained after the winding-up: *Macfarlane's Claim*. (1) We submit that the right of proof is not cut down by the Act of 1909. All that Act does is to lay down what in certain cases is to be the measure of proof. If before a proof is carried in, in the case of a life policy, the life drops, then the liability of the company is no longer a matter of estimate: *In re Dodds*. (2)

(1) 17 Ch. D. 337. (2) 25 Q. B. D. 529.

[KENNEDY L.J. The learned judge does not refer in that case to *Ex parte Bates* (1), although it was strongly argued.]

But for the Act of 1909 the claimants would have been entitled to prove for the full amount of their claim: *Craig's Executors' Case* (2); *Macfarlane's Claim* (3); *In re Dodds.* (4) There is nothing in the subsequent legislation to take away those rights. The Act of 1909 is only an additional step beyond the Life Assurance Companies Act, 1872. The effect of s. 5 of the Act of 1872 was to apply the rule laid down by Lord Cairns in *Lancaster's Case* (5) to life policies. There is nothing in the Act of 1909 to take away the right to prove for damages under the old law.

[BUCKLEY L.J. referred to s. 158 of the Companies Act, 1862.]

But *Craig's Executors' Case* (2) decided that the happening of the event fixes the value. The right to prove for the full value of a liability which has matured after the liquidation is not taken away by the Act of 1872. That Act only applies where there is anything "requiring to be valued." It does not apply where the amount of the claim is ascertained by the happening of the event. Express words are required to take away definite existing rights, and no such words are found in s. 5.

It is said that s. 17 and Scheds. VI. and VII. of the Act of 1909 constitute a complete code of rules for valuing policies in the winding-up of each class of insurance companies dealt with by the Act. But that is not so. In s. 17 two things are contemplated—(1.) proof for the value of the policy, and (2.) proof in respect of a liability under the policy requiring to be valued. Claims under the second head are not confined to liabilities originating before the winding-up. If it be so, then all that is necessary to prove for is the value of the policy. Sched. VI. (D) applies to a liability arising subsequent to the liquidation and is strictly in accordance with the old rights of a policy-holder which are not to be taken away unless by express words. As to the time at which the valuation is to be made it is submitted that the crucial date is the date of the claim to prove.

(1) (1879) 11 Ch. D. 914.
(2) (1870) L. R. 9 Eq. 706.
(3) 17 Ch. D. 337.
(4) 25 Q. B. D. 529.
(5) L. R. 14 Eq. 72, n.

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[COZENS-HARDY M.R. referred to *Wallberg's Case.* (1)]

As to the Scottish case (*In re Life and Health Assurance Association, Ld., Berry's Claim* (2)), Lord Cullen does not deal with the rights of a policy-holder prior to the Act of 1909. That Act must be construed in the light of past history, and the question is whether the pre-existing rights of a policy-holder in a liquidation have been taken away. It is submitted that they have not and that the judgment appealed from is right. [They also repeated arguments used in the Court below.]

Maugham in reply.

Cur. adv. vult.

1913. May 7. COZENS-HARDY M.R. This appeal raises the question whether under an employers' liability policy the holder can prove in respect of claims maturing after the date of the winding-up order. The policy was issued in 1909, and was renewed in 1910. It covered the insured up to July 1, 1911. On December 8, 1910, a petition to wind up was presented, and a compulsory order to wind up was made on December 20, 1910. A proof was brought in claiming (*a*) in respect of accidents prior to December, 1910, as to which no question arose, and (*b*) in respect of accidents in March, 1911. The liquidator rejected the latter, and the matter was brought by way of appeal before Neville J. Prior to the Employers' Liability Insurance Companies Act, 1907, there was no special legislation affecting such companies. The company would have been wound up under the Companies Acts then in force. A policy-holder would have been entitled to prove, (1.) on account of accidents prior to the winding-up order, and an estimate would have been made under s. 158 of the value as at that date of any weekly payments; with regard to any capital sum, whether for arrears due to the workman or for compensation in case of death to the dependants of the workman, no estimate would be needed; and (2.) for the loss to the policy-holder by reason of the repudiation of the contract at the date of the winding-up order. This must often be matter of speculation. But if during the currency of the policy an accident occurred

(1) (1872) European Arbitration Rep. 65, 78; L. T. 50.
(2) See p. 137, post.

which, if the contract of indemnity had not been repudiated, would have entitled the holder to £*x*, the Court treated that fact as evidence pro tanto of the value of the indemnity, and the holder could have proved for £*x* less a discount for the period between the winding-up order and the date of the accident. This would not have exhausted the right of proof, for there might be a necessity for speculation as to the value of the indemnity beyond £*x*. This was the principle of Sir George Jessel's decision in *Macfarlane's Claim.* (1) The claim could be made at any time during the continuance of the winding-up, but not so as to disturb prior dividends. That was a claim under a fire policy, to which also there was no special legislation applicable.

The Employers' Liability Insurance Companies Act, 1907, for the first time made special provisions with reference to employers' liability policies. It is not necessary to refer more particularly to that Act, which was repealed by the Assurance Companies Act, 1909, which is now the governing statute. The necessity for some special legislation is obvious. The number of policies, and still more the number of workmen whose claims are covered by policies, is very great, and the task of investigating the value of a weekly payment, depending to some extent on the personal conditions of health of each payee, was, as a matter of business, impossible. The Workmen's Compensation Act, 1906, in Sched. I., r. 17, stated the terms upon which the employer could redeem a weekly payment, and the Legislature adopted those terms as defining the value as between the assured and the company. It also laid down a rule for ascertaining the value to the assured of the indemnity which, by the repudiation of the contract, he has lost. Whether the Legislature has done more than this, and if so, how much more, is the crucial question on this appeal. The answer depends upon a careful consideration of some obscure language in the Act of 1909. Sect. 1 defines employers' liability insurance business. It apparently covers only the business of insuring employers against liability to pay compensation or damages to workmen in their employment. These words do not extend to claims of dependants under the Workmen's Compensation Act, and

(1) 17 Ch. D. 337.

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possibly not to damages under Lord Campbell's Act. But a company carrying on employers' liability insurance business may grant a policy extending to wider claims. Sect. 15 makes the Companies Consolidation Act, 1908, apply to all assurance companies except so far as specially modified by the Act. Sect. 17 is as follows: "Where an assurance company is being wound up by the Court, or subject to the supervision of the Court, or voluntarily, the value of a policy of any class or of a liability under such a policy requiring to be valued in such winding-up shall be estimated in manner applicable to policies and liabilities of that class provided by the Sixth Schedule to this Act." There are several points of difficulty on this sub-section. The "value of a policy" is one thing; a "liability under such a policy" is a different thing. I think the latter words refer to a liability which has emerged and which may or may not "require to be valued." For example a capital sum due to dependants under the Workmen's Compensation Act, or damages recovered in an action, do not require to be valued, whereas a weekly payment to an insured workman does require to be valued or estimated. I think the earlier words refer to the value of the indemnity given by the policy viewed as on the date of the winding-up. For it must not be forgotten that a workman is not taken out of the policy by the receipt of a weekly payment. The policy covers any future accident during the currency of the policy to the same workman, or, in most cases, to any other workman who may take his place.

Turning to the Sixth Schedule (D), which is the part applicable to the present case, the first part is headed "Rule for valuing a weekly payment." It is substantially taken from the redemption section of the Workmen's Compensation Act. It prescribes the mode in which, if the incapacity is permanent, the value of the weekly payment must be ascertained. Where the incapacity is not permanent, no rule is laid down. In that case s. 206 of the Companies Act, 1908, must be applied. It is, I think, plain that this first part is not exhaustive. It cannot be that capital sums due in respect of accidents are not to be provided for. They fall under the general provisions of the Act of 1908. It is, in my opinion, clear that the date of the winding-up order, and

not the commencement of the winding-up, is the critical date for the purpose of s. 206. This is the necessary effect of rr. 96 and 97, and apart from those rules, Form 63, so far as it is applicable, proceeds on the same lines. The second part of (D) is headed "Rule for valuing a policy." It is as follows: "The value of a current policy shall be such portion of the last premium paid as is proportionate to the unexpired portion of the period in respect of which the premium was paid, together with, in the case of a policy under which any weekly payment is payable, the present value of that weekly payment." The words at the end of this second part create a difficulty. They seem like a duplication of the first part. But I think this is not so. The first part deals with the simple case of an emerged liability under a policy which may or may not be current. For example, in the present case, where an accident happened, say, shortly after the policy was issued in 1909, a rule for valuing that liability as on December 20, 1910, is given in the first part. The second part presupposes a current policy. The main element which has to be valued is ascertained by reference to the unexpired rateable proportion of the premium paid. But there may be, at the date of the winding-up order, some weekly payment actually payable in respect of an accident during the currency of the policy, and in that event the present value, ascertained as directed in the first part, must be added.

It is important to observe that s. 17 deals only with matters which require to be valued as distinct from capital liabilities which do not call for any valuation; and (D) in the Sixth Schedule accurately supplies the want in cases where weekly payments are secured. It follows that s. 17 and (D) are imperative and exclude any other mode of valuation. In short, they negative the principle of *Macfarlane's Claim*. (1) I am unable to accept the view of Neville J. I think the only proof, except that in respect of accidents prior to December, 1910, must be for the apportioned part of the premium paid for the period from December 20, 1910, to July 1, 1911.

In my opinion, Neville J.'s order should be discharged and a declaration to the above effect be substituted.

(1) 17 Ch. D. 337.

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This being a test case, the costs of all parties of the appeal will be paid by the liquidator out of the assets.

BUCKLEY L.J. With much of the reasoning of the judgment just delivered I agree. From its conclusions I respectfully differ. Subject to a variation which is not unimportant, the order under appeal, I think, is right.

This company is in liquidation under a compulsory order made on December 20, 1910, on a petition presented on December 8, 1910. Messrs. King & Sons, Limited, the respondents to this appeal, are policy-holders holding a policy current for the year July 1, 1910, to June 30, 1911, on which they had before the winding-up paid a premium of 147*l.* 16*s.* 3*d.* to insure them in respect of liability under the Employers' Liability Act and Workmen's Compensation Acts in respect of a large number of servants whose wages amounted in the aggregate to 6150*l.* On January 27, 1911, the policy-holders lodged a first proof upon which nothing arises, and on October 4, 1911, lodged a second proof in which they included a proof for two sums of 328*l.* and 661*l.* in respect of accidents to servants which occurred in March, 1911, at a date that is subsequent to the winding-up and before proof. The question is whether the liquidator ought to admit a proof for a sum in the estimate of which there ought to be taken into account the fact that accidents resulting in liabilities to the extent of those two sums had occurred before proof admitted. The question turns upon s. 206 of the Companies (Consolidation) Act, 1908, s. 17 of the Assurance Companies Act, 1909, and the Sixth Schedule to the last-mentioned Act.

Sect. 158 of the Companies Act, 1862, which is reproduced with some alteration in s. 206 of the Act of 1908, was a section which admitted to proof, in the winding-up, debts and claims under very large words of description. Under other provisions of the Act it resulted that when a company went into liquidation its assets were to be got in and realized, and the resulting fund was to be divided in satisfaction pro rata of its debts. Sects. 98 and 107 of the Act of 1862 are sufficient for reference to shew that in respect of debts existing at the time of the winding-up there was to be a right of proof and distribution. But s. 158

rendered admissible to proof debts payable on a contingency and claims against the company present or future, certain or contingent, ascertained or sounding only in damages, and went on to say how obligations or liabilities of that kind were to be dealt with. The relevant words are "a just estimate being made, so far as is possible, of the value of all such debts or claims as may be subject to any contingency or sound only in damages, or for some other reason do not bear a certain value." Any liability falling within the words of the section which was not a debt at the winding-up was by that section admissible to proof, and the proof was to be of "the value" of the debt or claim, to be estimated if it was subject to a contingency or did not bear a certain value. In 1870 James V.-C. in *Craig's Executors' Case* (1) held that, where the claim in question was that of the holder of a policy of life assurance in a winding-up in which the order was made on September 17, 1869, and a death occurred on November 5, 1869, the executors were entitled to prove for the amount insured by the policy. The reasons given by the Vice-Chancellor were that the dropping of the life before proof, though it would not entitle the policy-holder to full payment, would be taken into consideration by the Court as affording evidence of the value of the policy at the time of taking in the claim. The decision was that under s. 158 that which is admissible to proof is the value of the claim which, at the date of the winding-up, was contingent and whose value was to be estimated upon a just estimate being made so far as possible, and that the fact that the life had dropped was admissible for the purpose of shewing what was at the date of the winding-up the just estimate of the value of the then contingent claim. The proof was admitted for the amount insured by the policy, not because that amount could be claimed against the company as a debt, but because the subsequent facts shewed that, at the date of the winding-up, the value of the contingent claim was the present value of that sum. The value of the claim at the date of the winding-up had to be estimated, and the true figure of the estimate could be assisted by the fact that the life had dropped before proof. No one seems to have suggested that the proper amount was not the sum assured but

(1) L. R. 9 Eq. 711—720.

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the present value of the sum assured. The latter is, however, the accurate amount, and it follows from the Vice-Chancellor's language, I think, that if the point had been mentioned he would have so directed. In 1872 the Life Assurance Companies Act, 1872, came into operation. Sect. 5 of that Act and the schedules contain statutory provisions as to the manner in which the value of life annuities and life policies required to be valued in the winding-up are to be estimated. There had arisen in *Bell's Case* (1), *Lancaster's Case* (2), and *Holdich's Case* (3) conflicting views as to what was the proper principle of valuation, and it is the fact that the result of the Act was to adopt one of those views, namely, that of Lord Cairns in *Lancaster's Case* (2), to the exclusion of that of James V.-C. in *Bell's Case.* (1) The respondents say that that was the whole effect of that Act of Parliament, and that it contained no general statutory enactment as to the mode of valuation which is to be adopted where, upon a policy current at the winding-up, there emerges an ascertained liability before proof. I do not assent to this argument. After the Act the policy-holder must, I agree, take that which the Act gives him, and can have no more. But from this proposition there does not follow that which the appellant says results. In 1880 there arose, in *Macfarlane's Claim* (4), not upon a life policy but upon a fire policy, a question similar to that which had arisen upon a life policy in *Craig's Executors' Case.* (5) The winding-up order there was made on December 13, 1879, on a petition presented on November 26, 1879. The premises were burnt down on January 22, 1880. It was held that the policy-holder was entitled to prove for the full amount of the loss covered by the policy, although the fire was subsequent to the winding-up. The decision is, I think, similar to that in *Craig's Executors' Case.* (5) The principle is this. For the purpose of proof under s. 158 of the Companies Act, 1862, there is to be ascertained the value at the winding-up of the contingent claim. In ascertaining what that value was at the winding-up the subsequent fact that there was a fire may be taken into account. The proof is not for the amount

(1) L. R. 9 Eq. 706.
(2) L. R. 14 Eq. 72, n.
(3) L. R. 14 Eq. 72.
(4) 17 Ch. D. 337.
(5) L. R. 9 Eq. 706.

insured by the policy as a debt, but is a proof for the estimated value of the claim at the winding-up, and upon the question of that value a subsequent fire is admissible evidence.

In 1908 the Companies (Consolidation) Act was passed, and s. 158 of the Act of 1862 was repealed and reproduced in s. 206 of the Act of 1908. For the present purpose s. 206 is in the same terms as s. 158, with the addition of words which substantively render applicable in the case of insolvent companies the law of bankruptcy. In 1909 was passed the Assurance Companies Act, 1909. It dealt with companies of five classes, life assurance, fire insurance, accident insurance, employers' liability insurance, and bond investment business. The question in this case is as to the effect of s. 17 of that Act and the Sixth Schedule. That schedule relates to employers' liability policies. It is with that subject-matter alone that we have to do. Sect. 17 speaks of two things whose value is to be dealt with, namely (1.) a policy, and (2.) a liability under a policy. I will first say what I think is here meant. The Act was dealing with policies of many different kinds, including many upon which a liability might have arisen upon some one event having happened, and at the same time the policy might remain current to cover like risks if further events happened. For example, the policy might insure 1000 workmen for a year—accidents might have occurred to two of them—like accidents during the currency of the policy might occur to others. As regards the two workmen, there has in that state of facts arisen a liability under the policy. As regards the 1000, there is a still current policy. The schedule is going to tell us how to value each of these two things. The section uses the words "requiring to be valued." As I have already pointed out, it was necessary, for the purposes of s. 158 of 1862, while it existed, and it is necessary for the purposes of s. 206 of 1908, as it exists, to find the value of the contingent debt or claim, for that is the amount admissible to proof. Every obligation which is not a debt, but which is by virtue of s. 206 to be provable and to take a dividend although it is not a debt, is a thing requiring to be valued. The words "requiring to be valued" apply, I think, to both the subject-matters previously mentioned, namely, (1.) the policy, and (2.) the liability under

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the policy. The policy itself is of course a liability of the insuring company, and the value of the policy to the policy-holder is the value of that liability. But the words "liability under a policy" are obviously used in some other sense. They mean, I think, that which has emerged as a liability—emerged, that is, at the relevant date, namely, the date of the winding-up. The Sixth Schedule (D), which is the one relevant to the particular sort of policy with which I have to do, is then in two parts, the one relevant to "a weekly payment," and the other to "a policy." That relating to "a weekly payment" is addressed, I think, to that which s. 17 calls "a liability under a policy," that is to say, that which previously to the winding-up has emerged as a liability under the policy; while that relating to "a policy" —the second paragraph, that is, of (D)—relates to valuing the still current policy covering risks which at the winding-up have not yet resulted in claims. The matter then works out as follows: At the date of the winding-up there may have emerged a liability under the policy, say, first, in respect of a death before winding up. The result is that a liquidated sum has become payable. This is a debt, and nothing is wanted to ascertain its amount. Secondly, suppose there has, before the winding-up, arisen an accident producing permanent or temporary incapacity. There will then exist at the winding-up a liability under the policy to periodical payments in future of sums whose amount may vary from time to time, and the period over which they are payable will be uncertain. The first paragraph of (D) supplies a rule as to how such a liability as this is to be estimated for the purposes of proof. The language follows that of Sched. I. (17.) of the Workmen's Compensation Act, 1906. Liabilities under the policy emerged before the winding-up are then disposed of. It remains to value the policy. The second paragraph of (D) is then to be applied. The rule is that the value is the apportioned amount of the premium for the unexpired period together with a further sum in the case in which a weekly payment is payable under the policy. Bear in mind that every employers' liability policy carries with it liability to make weekly payments in certain events. The words "in the case of a policy under which any weekly payment

is payable" must, therefore, mean "has become payable." Has become payable when? This cannot be a weekly payment which became a liability before the winding up, for that has already been estimated and provided for under the first half of (D). The only thing which can be meant is a weekly payment which has become payable under the policy, not before the winding up but before the proof. It is true that the provision thus made is not exhaustive. There may have been a death after winding up and before proof. As to this the Act is silent. There may have been a claim not under the Workmen's Compensation Act, but for damages under the Employers' Liability Act. As to this the Act is silent. But the fact that it is not exhaustive does not in any way affect the fact that the weekly payment mentioned in the second half of (D) must in my view be a weekly payment in respect of a liability which has not emerged before winding up, for that is covered by the first half of (D). It must be a weekly payment the liability in respect of which has emerged at some other time, and that must be after winding up and before proof. It is pressed upon us that this view results in giving the policy-holder a right of proof twice for the same liability. I think not. The question to be answered is, what was the value of the policy at the date of the winding-up, what is the pecuniary equivalent of the contract to the policy-holder? Make the assumption that as from the date of the winding-up there is no contract, what is the proper sum which the policy-holder can claim as putting him in as good a position as if there had been a contract? The value is to be substituted for the contract, and is to be the equivalent sum. At the date of the winding-up the contract indemnified the policy-holder against liability in respect of all accidents which happened during the currency of the policy and all risk in respect of accidents which did not happen. If before proof an accident occurs, he receives the equivalent as measured by subsequent events if he receives the pecuniary amount for which he is chargeable by reason of the accident, and also protection against all other accidents if any should occur, but not if he receives a less sum. The apportioned premium represents the latter of these; the present value of the accident liability represents the former. Thus, if the policy covered 1000 servants, and two

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of them, after winding up and before proof, sustained an accident, the contract was one which indemnified him against the accident to the two men which actually did occur, and the risk of accident to the 1000 in the event of its occurrence. The proportionate amount of the premiums is the actuarial sum to cover the latter, and none the less because in fact a right has arisen to receive the former. If an accident occurs and a sum becomes payable, the premium to cover future risks is not thereby reduced. It is true that the proof for the proportionate amount of premiums results in payment to the insuring company of no premium for a period covering the date at which the accident happens, and it is argued that the result is that the policy-holder gets the benefit of insurance at a date over which he has not paid a premium. This is not so. The fallacy lies in thinking that he gets the accident money because an accident occurs while the policy is current. He does not. The policy-holder has no claim to have payment of the sum attributable to the accident as a debt. The company is not indebted to him in that sum at all. The company was not assuring him at that date. The hypothesis is to be made that the contract of assurance came to an end at the winding-up. What the policy-holder is entitled to is the value of the contract at the date of the winding-up, and the fact that there was an accident and the amount recoverable in respect of it are no more than evidence to shew what, at the date of the winding-up, was the value to him of the contract contained in the policy which as at that date is to be taken to have come to an end. The same proposition may be stated in other words as follows: At the date of proof what would another office want as the price of taking over as from the date of the winding-up the liability on the policy? Obviously it would want the sum payable to the man who had been injured since that date, and in addition the proportionate amount of the premium to cover the still current risk.

I agree, subject to something to be stated presently, that after the statute the policy-holder must take that which the statute gives him, and no more. The doctrine of *Craig's Executors' Case* (1) and *Macfarlane's Claim* (2) is applicable, I think, not because it must

(1) L. R. 9 Eq. 706. (2) 17 Ch. D. 337.

be taken to survive by reason of the fact that the statute has not by so many words taken it away, but because the principle is as applicable under the statute as it was before. The estimated value under the statute is to include in the case of a policy such as here in question the present value of a weekly payment. To ascertain what that value is at the date of the winding-up, subsequent facts can be taken into account, and in that way the value as at the date of the winding-up of the subsequently arising liability to pay the accident moneys is an element in determining the proper figure.

It remains, however, to point out that under the Act of 1909 (as was also the case under the Act of 1872) the rules in the schedule are (see s. 17, sub-s. 2) to be of the same force as if they were rules under s. 238 of the Companies (Consolidation) Act, 1908, that is to say, were "rules of procedure," and may be repealed, altered, or amended as there provided. The result, I think, is not to substitute arbitrary statutory rules of valuation, but to lay down rules of procedure which are by virtue of the statute to be applied until some alteration is validly made. The order under appeal is, I think, in substance right, but the language is not accurate. The policy-holder is not entitled to prove for obligations incurred under the contract after the winding-up. He is entitled to prove for the value of the policy at the date of the winding-up, and in that value ought to be included the value as at the date of the winding-up of any sums which before proof admitted have emerged as liabilities in respect of weekly payments. The declaration ought to be altered by striking out (ii.) and (iii.) and substituting words to the effect that the claimants are entitled to prove for the value of the policy according to the rule in the second paragraph of Sched. VI. (D) of the Act of 1909, including the present value as at the date of the winding-up of the weekly payments or other moneys for which liability has arisen under accidents which have occurred after winding up and before proof. The manner in which the present value of a weekly payment is to be ascertained for the purposes of the second paragraph of (D) is not stated in the statute. It is for the judge, therefore, to ascertain that as he thinks right. I apprehend that it would be right to proceed on the same principle as is by the first paragraph

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of (D) required in the case of a weekly payment in respect of an accident which has resulted in a liability before the winding-up. The order, I think, should be varied in the respects which I have stated.

KENNEDY L.J. This case is one of general importance, because it involves the consideration of the rights under the Assurance Companies Act, 1909 (9 Edw. 7, c. 49), in a winding-up of all those—and there are many—who, as assurers or as assured, are parties to policies of insurance issued by a company which carries on employers' liability insurance business. It is also a case of some difficulty, and the opinion which I have formed differs from that which appears in the judgment of Neville J. in the Court below. It becomes, therefore, from every point of view, my duty to state fully, though as shortly as is practicable, the reasons which have led me to the conclusion at which I have arrived.

The material facts are these. Joseph John King & Sons, Limited, (the respondents in this appeal) in the year 1909 effected an employers' liability policy with the Law Car and General Insurance Corporation, Limited, and that policy was renewed in the year 1910, and would have remained current until June 30, 1911. In December, 1910, however, a winding-up petition was presented, and a compulsory winding-up order was made on the 20th of that month. Upon the same day a liquidator, who is the appellant in this appeal, was duly appointed. In the liquidation the respondents sent in a proof on January 27, 1911, and a further proof on October 4, 1911, and in the latter proof they claimed, as under the policy, in respect of compensation due to workmen for accidents which occurred in March, 1911, that is to say, between two and three months after the date of the winding-up order. The liquidator rejected this second proof, and the question of its admissibility came before my brother Neville. On December 10, 1912, the learned judge made the following declaration and order in favour of the respondents:— "This Court doth order that the company are entitled to prove in respect of: (i.) Obligations presently incurred under the contract of assurance at the date of the winding-up. (ii.) Obligations

presently incurred under the contract of assurance since the date of the winding-up, and (iii.) Estimated loss incurred by them by the repudiation of the contract of insurance, And doth order that the said liquidator do admit the proofs of the applicant on the footing of this declaration."

The appeal of the liquidator before this Court relates to paragraph 2 of the foregoing order, which admits to proof obligations which came into being after the date of the winding-up order, and which, therefore, sanctions the claim of the respondents to include in their proof the head of compensation in respect of the accidents to workmen which occurred in March, 1911. The appellant asks that the declaration and order made by Neville J. may be set aside, and that it may be declared in lieu thereof that the said corporation are entitled to prove only for such portion of the last premium paid by them under the policy as is proportional to the unexpired portion of the period in respect of which the said premium was paid. The case turns upon the interpretation of one section, s. 17, of the Assurance Companies Act, 1909, and of Part (D) of the Sixth Schedule, which is referred to in that section. The Act contains a number of provisions for the regulation of assurance companies, and is described in its title as a consolidating and amending Act. It is an Act which carefully distinguishes and legislates separately, as their essential differences require, for five classes of insurance, that is, life assurance, fire insurance, accident insurance, employers' liability insurance, and bond investment. In the case of a winding-up of any of these assurance companies, s. 15 no doubt makes the provisions of the Companies (Consolidation) Act, 1908, applicable with certain modifications. But the Sixth Schedule prescribes a separate and distinct method of valuation for the purposes of proof in regard to each one of the five different classes of insurance. It follows, therefore, in my view, that, in dealing with the present case, which relates to employers' liability insurance, as it is legislated for in this Act, we are likely not to clarify, but rather to confuse, our judgment, if we import into its consideration inferences drawn either from the provisions which the Act confines to other classes of insurance or from judicial decisions or dicta which have been pronounced

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before this Act came into force in regard to the valuation for the purpose of proof in a winding-up, under policies which belonged to a different class of insurance. It is well, I think, before considering the provisions of the statute which we have to interpret, to see what are the risks which are covered by the policy in question.

The Law Car and General Insurance Corporation, Limited, contracted with the respondents to indemnify them against all sums for which, during the currency of the policy, the assured, in respect of personal injuries by accident or disease, happening to any of the employees of the respondents, should be liable to pay under the Fatal Accidents Act, 1846, the Employers' Liability Act, 1880, the Workmen's Compensation Acts, 1897, 1900, and 1906, or at common law. The liability of the respondents under these various statutes is not uniform in character. Under the Fatal Accidents Act, 1846, it is a liability to pay compensation to the relatives or representatives of the deceased workman in case of death only. Under the Employer's Liability Act, 1880, it is a liability, in certain events, to pay compensation to the workman who is not fatally injured, and to his legal representatives if the injury results in his death. The liability of the employer under both of these Acts, and under the common law, presents one common feature: the claim to compensation is a claim in damages to be assessed once and for all. Under the Workmen's Compensation Acts, 1897—1906, however, there are three classes of compensation: there is provision for payment of compensation in the shape of a lump sum to a workman's dependants if the accident is a fatal accident; there is provision for periodical weekly payments to the injured workman during the period of his incapacity to work; and, in the case of the period of his incapacity exceeding six months, for the commutation of such payments for a lump sum. Indemnity to the employer for compensation in all these forms is included in the business denominated as employers' liability insurance in s. 1 (*d*) of the Act of 1909.

Now suppose the insuring company to be, as the Law Car and General Insurance Corporation, Limited, is in the present case, wound up during the currency of a policy. What are the proper constituent elements of the proof of the assured in the winding-

up? As to one element there can be no sort of doubt. The proof will include all liquidated amounts which, in respect of compensation under any of the statutes which I have mentioned, have become due and payable by the insurance company to the assured before the date of the winding-up order, but in respect of which the assured has not before that date been indemnified by the company. As to proof in respect of such claims, there is no sort of difficulty; no calculation or estimate is required; they are in the nature of debts, the amount of which is either actually ascertained or certainly ascertainable. There was therefore no necessity in the Act of 1909 to legislate in regard to the proof of the assured in respect of liquidated claims of this sort which had become due before the date of the winding-up order.

But it is clear that, the policy being at that date a current policy of the class of an employers' liability insurance, the assured's right of proof in the winding-up of the insurance company must, in order to do him justice, include two other elements of a different, because of an unascertained and contingent, character. The winding-up order deprives him in regard to both of the protection to which he was entitled for the unexpired portion of the period covered by the policy. In respect of both these elements the value of the policy for this unexpired portion has to be estimated. The first of these two elements is this. The winding-up order leaves the assured without indemnity under his policy for the future unexpired period of the policy in respect of the weekly payments falling due under the Workmen's Compensation Act from the assured to workmen whose injuries have taken place before the date of the winding-up order and whose incapacity has not ceased at that date. The liability in each of such cases has emerged before the date of the winding-up, but it is continuing after that date, and the assured clearly has a right to have a valuation in his proof in respect of the loss of indemnity in respect of such continuing weekly payments, but it is one which must be the subject of valuation. The continuance of the incapacity of the workman, and therefore of the weekly payment, is, of course, in any case uncertain; but the proof will be incomplete unless it includes some estimate of his claim. The second element requiring valuation is the loss of the benefit of

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the policy as a protection to the assured against the contingency of future liability in respect of compensation which may become payable to workmen in respect of injuries happening after the date of the winding-up order and during the portion of the period covered by the policy which is at that date unexpired. Sect. 17 and Sched. VI. (D) prescribe in both of these two respects the method of valuation for the purposes of proof. Sect. 17 is in the following terms :—"Where an assurance company is being wound up by the Court, or subject to the supervision of the Court, or voluntarily, the value of a policy of any class or of a liability under such a policy requiring to be valued in such winding-up shall be estimated in manner applicable to policies and liabilities of that class provided by the Sixth Schedule to this Act." It is, in my opinion, clear from the text and from the terms of the schedule, which I shall presently quote, and both of the parties to this appeal agree, that the words "liability under such a policy requiring to be valued" refer to a liability that has emerged before the date of the winding-up of the nature which I have just stated, that is, a liability to indemnify the assured in respect of weekly payments due to injured workmen under the Workmen's Compensation Act which has emerged before the date of the winding-up order and is still continuing. It is equally clear, I think, that the expression "the value of a policy . . . . requiring to be valued," in regard to employers' liability insurance, refers to the value of the policy, independently of its covering emerged liabilities, as providing an indemnity to the assured against possible contingent claims in respect of injuries to workman which have not emerged before the date of the winding-up order, but which may emerge during the yet unexpired period of the policy.

Turning to the Sixth Schedule, we find under (D) the method of valuation which the Act prescribes in respect of both heads of valuation. First comes the "Rule for valuing a weekly payment": "The present value of a weekly payment shall, if the incapacity of the workman in respect of which it is payable is total permanent incapacity, be such an amount as would, if invested in the purchase of an immediate life annuity from the National Debt Commissioners through the Post Office Savings Bank, purchase

an annuity for the workman equal to seventy-five per centum of the annual value of the weekly payment, and, in any other case shall be such proportion of such amount as may, under the circumstances of the case, be proper." Having thus provided for the valuation of liabilities which have emerged and are still continuing, the schedule proceeds in the next following paragraph to prescribe how the policy, that is, the contract to indemnify the assured during the yet unexpired period of the policy, is to be valued, and it does so in the following terms :—" The value of a current policy shall be such portion of the last premium paid as is proportionate to the unexpired portion of the period in respect of which the premium was paid, together with, in the case of a policy under which any weekly payment is payable, the present value of that weekly payment."

In my humble judgment, the meaning of this rule is intelligible and clear. The Legislature might have enacted, and I think that, if the Act had not made this special and explicit provision, the Courts would probably have held, that the assured might value his policy as best he could, estimating, according to general experience of the risk of accidents in his trade and his own experience in the past, and the number of his workmen exposed to such risks, what, for the value of the policy during the unexpired period of his policy, was a fair figure to insert in his proof, in addition to the valuation of the " emerged liabilities " made under the preceding paragraph of (D). In the case of such an estimate, there would be no inconsistency in allowing, as Sir George Jessel M.R. held to be right in *Macfarlane's Claim* (1), that, if before the proof was put in, a contingency covered by the terms of the policy occurred, the loss so ascertained might be taken into consideration in estimating the value of the policy. But the Legislature has, in my judgment, in plain terms, in this paragraph of Sched. VI. (D), chosen to prescribe an essentially different method of valuation—a method which certainly has the merit of simplicity. It has said to the assured : " You shall in regard to the value of the policy not enter into any estimate of contingencies at all. The amount for which you shall prove shall be that portion of the premiums paid by you as the

(1) 17 Ch. D. 337.

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consideration for the current policy which is proportionate to the unexpired portion of the period covered by the policy; that, together with the sum which represents the present value of the emerged liabilities for weekly payments, which is to be ascertained in the way prescribed under the first paragraph of (D), shall be the amount, so far as the proof is matter of estimate and not of liquidated claim actually due, for which you shall be entitled to prove in the liquidation." It appears to me that the judgment under appeal, in effect, substitutes for the premium valuation which this Sixth Schedule (D) in express terms ordains as constituting, with the present value of emerged and continuing liabilities, the valuation of this class of policy, so far as valuation is required, a method of valuation on a totally different basis for which I can find no sort of authority in the text of the schedule. There is nothing unreasonable in the scheme of a valuation on the basis of the partial return of premium. The assured is paid the portion of the premiums which is proportionate to the unexpired portion of the policy, and so receives a sum with which, in respect of that unexpired portion, he can effect a policy with other insurers to cover the same contingencies as were covered by the policy of which he has lost the benefit; and if he gets this, and also, as the same paragraph provides, the present value of every weekly payment payable at the date of the winding-up order, it appears to me that there is no basis in reason for superadding, as the respondents claim to do, a right to prove for the amount of a liability which occurs after the date of the winding-up, or, as the respondents' counsel appeared alternatively to contend, a right to prove for the value of the policy as ascertained by such subsequently occurring event. Indeed, it seems to me that, if the value of the policy is, as (D) in terms expressly prescribes, together with the present value of any weekly payment, the amount of the premium for the future unexpired term of the policy, it is patently inconsistent to include in the proof with this a subsequent loss, and so give the assured both a right of proof in respect of a contingency occurring in a period after the winding-up order, and also a return of the premium payable in respect of that period. In my humble judgment, it is sufficient, for the decision of this case, to say that

the statute has prescribed a rule for valuing a policy of this class, and that rule distinctly tells you that your valuation is to consist of the amount of the premium which is proportionate to the unexpired portion of the period in respect of which the premium was paid plus the present value of any weekly payments payable at the date of the valuation. But, if you look beyond the plain meaning of the statute, and consider the reasonableness of the respondents' contention, how can it be reasonable if the valuation of the policy is upon the basis of a repayment of premium to blend with that an alien and incongruous element of valuation on the basis of a valuation either of contingencies or of events happening after the winding-up? Further, as the learned counsel for the appellant pointed out in the argument, the inclusion in the valuation of the policy of events occurring subsequently to the date of the winding-up is inconsistent with the statute from another point of view. The date of the valuation, as the provision as to the premiums itself shews and as the words "is payable" in the last line of the second paragraph of (D) pretty clearly indicate, is the date of the winding-up order. The Master of the Rolls, I think, pointed out in the course of the hearing that this is in accordance with rr. 96 and 97 and Form 63 of the Companies (Winding-up) Rules, 1909; and both Lord Cairns, in *Lancaster's Case* (1), and, in very emphatic terms, Lord Westbury in *Wallberg's Case* (2), have held that, for the purposes of proof, the valuation must be made at the date of the winding-up order. "The necessity arises," said Lord Westbury, "as I have said, when the order to wind up is made; and that, therefore, becomes necessarily the date of the valuation." The proof, it is said, may be put in at any time. Assuming in the present case that the assured waits to send it in until June 29, 1911, the day before the date on which this policy would expire, the assured, if the judgment below is right, would then have a right to prove not only, as this statute prescribes, for so much of the premium as is proportionate to the period from December 20, 1910, to June 30, 1911, but also at the same time in respect of the value of the policy as shewn by the actual

(1) L. R. 14 Eq. 72, n.
(2) European Arbitration Rep. 78.

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occurrence of liabilities covered by the policy during the whole of that period.

It seems to me that the construction of the statute and schedule which the appellant asks the Court to adopt is not only the natural, but, so far as justice is concerned, is also the preferable construction. Let me endeavour, in a few sentences, to sum up the legal position as I conceive it to be. As to the proof for ascertained amounts which at the date of the winding-up order had become due from the assurance company to the assured under the policy, there was no need to legislate, and no reference to this head of proof is made in this statute. Of course, the assured can prove for all such claims. But legislation was needed in regard to the valuation for proof in the winding-up, of liabilities in the shape of weekly payments which had emerged before the date of the winding-up order, and were continuing liabilities. For the valuation of these the Sixth Schedule has provided in the first paragraph of (D). Legislation was also needed as to the method of valuing the policy (apart from its value as a protection against such emerged liabilities) as a contract of indemnity in respect of contingencies, that is to say, the risk of fresh liabilities emerging after the date of the winding-up, and during the unexpired period of the policy. For this valuation also the Sixth Schedule has provided in (D). It has directed the valuation to take place, as at the date of the winding-up order, not on the basis of an estimate of such contingencies, but upon the basis of a partial return of premium. To this the present value of any weekly payment still payable, calculated in the manner which has been prescribed under the first paragraph of (D), is to be added.

It appears to me that the judgment appealed from, which adds to the proof another and incongruous element of valuation, is alike erroneous in regard to the construction of the statute, and leads to results undesirable in point of justice. I am glad to find that I have in support of the opinion which I have formed upon this case the support of the judgment of Lord Cullen in the Scottish case of *In re Life and Health Assurance Association, Ld., Berry's Claim.* (1)

(1) See p. 137, post.

In my opinion, for the reasons which I have stated, this appeal should be allowed.

Solicitors for the policy-holders: *W. W. Wynne & Sons, for Evans, Lockett & Co., Liverpool; A. E. Burton, for Scatcherd & Co., Leeds.*

Solicitors for the liquidator: *Rawle, Johnstone & Co., for Peace & Ellis, Wigan.*

G. A. S.

In re LIFE AND HEALTH ASSURANCE ASSOCIATION, LIMITED.

BERRY'S CLAIM.

THIS was a representative case with regard to claims arising after the commencement of the winding-up of the above association under policies current at the date of the winding-up order under these circumstances.

The association was incorporated in February, 1898, under the Companies Acts, 1862 to 1898. On May 14, 1909, the association passed resolutions for a voluntary winding-up which were followed on June 2, 1909, by a supervision order. Two liquidators were appointed. The association was insolvent.

One Berry was insured with the association against claims under the Employers' Liability Act, 1880, and the Workmen's Compensation Acts, 1897 to 1906, in respect of injuries to workmen arising from accidents whilst engaged in his service under a policy No. 4996 and dated November 17, 1898, at an annual premium of 6*l.* which was paid on December 8, 1898. The policy expired on December 8, 1909, so that it was current at the commencement of the winding-up.

No claim arose under the policy prior to the liquidation, but on June 1, 1909, an employee of Berry was injured by an accident arising in the course of his employment and was awarded compensation under the Workmen's Compensation Act, 1906, at the rate of 10*s.* 6*d.* per week as from June 1, 1909. In January, 1910, Berry lodged a claim in the winding-up for 386*l.* 3*s.* 6*d.*, being the estimated value of an annuity equivalent to the weekly sum of 10*s.* 6*d.* awarded to the workman. The liquidators rejected his claim on the ground that by virtue of the Employers' Liability Insurance Companies (Adaptation of Enactments) Order, 1907, and s. 5 of the Life Assurance Companies Act, 1872, and the schedules thereunder, he was only entitled to rank for the unexpired portion of the current premium under his policy subsequent to the liquidation. Berry contended that the Adaptation Order, 1907, and Act of 1872 did not apply to his claim which had matured after the winding-up, and that under s. 208 of the Companies (Consolidation) Act, 1908, and s. 53 of the Bankruptcy (Scotland) Act, 1856, he was entitled to have his claim admitted for the 386*l.* 3*s.* 6*d.* As a large number of

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similar claims had been lodged in the winding-up, the liquidators applied to the Court under the Act of 1908 to determine the question.

The Employers' Liability Insurance Companies (Adaptation of Enactments) Order, 1907 (1), substitutes throughout the Life Assurance Acts, 1870 and 1872, the words "employers' liability insurance" for the words "life insurance," and sets out in the First Schedule to the Act of 1872 the rules quoted by the Lord Ordinary in his judgment below.

1911. July 8. THE LORD ORDINARY (LORD CULLEN) delivered judgment as follows: The respondent in this appeal is the holder of a policy of the company in liquidation insuring him against claims by workmen in his employment. The policy was current at the commencement of the winding-up, the last premium having been paid on December 2, 1908, and the policy expiring on December 8, 1909. At the commencement of the winding-up, no claim under the policy had emerged, but on June 1, 1909, an accident happened to one of the respondent's workmen, which fell within the scope of the policy. The question now at issue is whether the respondent is entitled to rank in the liquidation for the amount paid by him to his workman in settlement of his claim. The liquidators have refused a ranking for this amount on the ground that, as the accident occurred subsequent to liquidation, the claim does not, according to the Employers' Liability Insurance Companies (Adaptation of Enactments) Order, 1907, form a liability of the association in liquidation. They have, however, admitted the respondent to a ranking "for the unexpired portion of the current premium," that is to say, the portion of the premium proportionate to the period between the commencement of the winding-up and the date of expiry of the policy. [His Lordship then quoted s. 208 of the Companies (Consolidation) Act, 1908, and s. 53 of the Bankruptcy (Scotland) Act, 1856, and proceeded:] The general rule in England as to contingent claims appears to be the same as in Scotland: see Buckley on Companies, 9th ed. p. 465, and cases there cited. If the rule of s. 53 of the 1856 Act applies to the present case, it is not, I think, disputed that the respondent is entitled to the ranking he claims. The liquidators, however, maintain that it does not apply. They appeal to the aforesaid Order of 1907, and to s. 5 of the Life Assurance Companies Act, 1872, as thereby adapted, and relative schedules. Sect. 5 (as adapted) provides: "Where an employers' liability insurance company is being wound up by the Court, or subject to the supervision of the Court, or voluntarily, the value of the liability of the company to the policy holders requiring to be valued in such winding-up shall be estimated in manner provided by the First Schedule to this Act." This schedule provides in the first place a rule for estimating "the present value of a weekly payment" to a workman.

Then there follows

"*Rule for valuing a Policy.*

"The value of a current policy shall be such portion of the last premium paid as is proportionate to the unexpired portion of the period in respect of which the premium was paid, together with, in the case of a policy under

(1) See Statutory Rules and Orders, 1907, pp. 323—341.

which any weekly payment is payable, the present value of that weekly payment."

It will be observed that in all cases where a current policy falls to be valued, the holder is to be ranked for the proportion of the premium corresponding to the unexpired period of the policy, and that, if a weekly payment is payable under it, he is in addition to be ranked for the value of that weekly payment estimated in the mode stated in the schedule. The enactment does not say in terms at what period the valuation is to be made. But when it speaks of "the unexpired portion of the period in respect of which the premium was paid," I take it that the date from which this is to be counted is the commencement of the winding-up. And if this be so, weekly payments, which may also fall to be valued in order to complete the valuation of the policy, are, I think, those for which liability emerged prior to the winding-up. It would be an anomalous mode of dealing with such a policy to give the holder a return of the portion of the premium corresponding to the period after the commencement of the winding-up, and at the same time to treat the risk as still running during that period. The returned portion of the premium may be practically the whole of it, as in the case of a policy effected immediately before the commencement of the winding-up. Of course, the return of the portion of the premium in question will be more or less full according to the amount of the distributable assets. But it is a return, so far as the assets go, on a ranking of the company's creditors according to their respective rights, and it may be as much as 20*s.* in the pound. If an extreme case may be figured where (1.) the policy is effected the day before the winding-up, and (2.) the assets yield a dividend of 20*s.* in the pound, it could not, I think, be intended that the policy-holder should both get a return of the whole premium paid by him, and also continue to enjoy the benefits of the insurance for which the returned premium was the consideration. It is true that the whole premium is paid as a unum quid in respect of the whole period of the policy, and that, upon the terms of the contract itself, no particular part of the premium can be said to be the consideration for insurance during any particular part of that period. The scheme of the enactment under consideration, however, seems to me to be to treat the contract on the occurrence of liquidation as divisible and to make the division as at the commencement of the winding-up. It allows claims which have emerged prior thereto to be proved, but terminates the risk quoad the future by returning what it fixes as the equivalent proportion of the premium. The course then open to the policy-holder is to insure elsewhere for the unexpired period of his policy, he obtaining reimbursement so far as the assets of the company in liquidation will yield it, through his ranking for the corresponding proportion of the premium. I am accordingly of opinion that the deliverance of the liquidators in this claim is right.

Agents for the liquidators: *Mackenzie & Kermack, W.S., Edinburgh.*
Agents for the respondent: *J. & J. Galletly, S.S.C., Edinburgh.*

H. L. F.

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Feb. 26, 27, 28; *March* 1, 3, 4, 5, 6, 7, 8, 11; *April* 14.

ATTORNEY-GENERAL *v.* HORNER (No. 2).

[1907 A. 98.]

Market—Extension of Market—Charter Days—By Days—In sive juxta—Overflow—Streets subject to Market Rights—Presumption of Lost Grant—Easement—Dedication subject to Obstruction—Private Market—Tolls—Reasonable—Payment by Sellers—Publication of Charges—Evidence—Maps—Copies from Record Office.

In 1682 Charles II. granted to H.'s predecessor in title a right to hold markets on Thursdays and Saturdays. In *Attorney-General* v. *Horner* (1884) 14 Q. B. D. 245; (1885) 11 App. Cas. 66, it was held that this charter authorized an overflow of the market into the adjoining streets on Thursdays and Saturdays, and that a lost charter for the other days of the week was not to be presumed. H. held markets on all the days of the week, made use of the adjoining streets for the purposes of these markets, and took tolls from the persons who used them; and took tolls from sellers instead of from buyers. An action was brought to restrain him from doing so:—

Held, that the question of a lost grant of a market on days other than Thursdays and Saturdays could not, after the decision in *Attorney-General* v. *Horner*, 14 Q. B. D. 245, be raised in that Court; that the defendant had no right in respect of a private market to overflow into the streets on days other than Thursdays and Saturdays; that he had always claimed to act under the franchise, and the Court would not presume a legal origin for a usage which was inconsistent with the right claimed, and would not presume that the streets had been dedicated to the public subject to the right of overflow; that in the absence of custom or prescription or individual contracts to the contrary market tolls were payable by the buyers and not by the sellers; that the tolls taken were reasonable and there was no obligation on a franchise owner to publish a list of his charges; and that the fact that other members of the public would be benefited by the continuance of the illegal acts was immaterial.

Maps from the British Museum and Guildhall Library not admitted as evidence of particular facts without further proof.

Copy from the Record Office of a petition, stated to have been filed there but not produced, admitted.

Decision of Warrington J. varied.

Appeal from a decision of Warrington J.

This was an action by the Attorney-General at the relation of the Corporation of the City of London against Robert Horner, the lessee of the land and buildings known as Spitalfields Market

and of the franchise for holding a market therein under a charter of Charles II.

The principal questions raised by the action were (1.) as to the days on which the defendant was entitled to exercise his franchise of holding markets—whether he was entitled to hold them on every day in the week except Sunday or was limited to holding them on Thursday and Saturday only; (2.) as to the user and obstruction of the streets adjoining the market; and (3.) as to the reasonableness of the tolls demanded and taken by the defendant from persons resorting to the market.

The plaintiff claimed a declaration that the holding by the defendant of markets at Spitalfields on any days of the week other than Thursday and Saturday was unlawful, and an injunction to restrain him from doing so; a declaration that he was not entitled to take any tolls from sellers or intending sellers of goods, tolls in respect of goods sold either by means of samples or in some other manner without being actually brought into the market, or tolls in respect of goods merely brought into or exposed for sale in the market, and particularly into or in any part of the market or of the streets adjoining the same, the soil whereof was not leased to or in his possession, and an injunction to restrain him from taking or demanding any such illegal tolls; a declaration that he was not entitled in respect of his markets to demand or take any tolls or other profits except such as were reasonable; a declaration that the tolls now and heretofore demanded and taken by him were unreasonable, rank, and outrageous, and an injunction to restrain him from demanding or taking tolls or stallage of an unreasonable amount; a declaration that he was not entitled to make any use of the streets adjoining Spitalfields Market and known as Lamb Street, Commercial Street, Brushfield Street, and Crispin Street, or of any other street in or about the said market, for any purpose of his markets, or to sell or authorize the sale of goods in any of such streets on any days of the week other than Thursday and Saturday, and was not entitled to cause any obstruction in or to the highways aforesaid on any other days than Thursday and Saturday; and an injunction to restrain him from holding any market in or using such streets or any of them for any purpose

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of his said markets or from selling or authorizing the sale of goods therein on any days of the week other than Thursday and Saturday, and from causing any obstruction in and to the highways aforesaid on any other days than Thursday and Saturday.

The defendant alleged that he and his predecessors in title had openly, uninterruptedly, and as of right from time immemorial or in the alternative for many years and beyond the time of living memory held a market at the place called or known as Spitalfields Market on every day of the week except Sundays, or in the alternative on Mondays, Tuesdays, Wednesdays, and Fridays in each week, or in the further alternative on Tuesdays, Thursdays, and Fridays in each week, and had taken and exercised tribute, tolls, rights, franchises, customs dues, piccage, stallage and other profits, perquisites, advantages and emoluments to such market appertaining; and that in respect of any day or days of the week to which the letters patent or such of them as were now in force did not extend he claimed to hold such market and to exercise such rights by custom or prescription or by virtue of a certain charter or charters or letters patent duly granted which had since been lost, but the existence whereof was to be presumed and inferred from the long exercise by him and his predecessors in title of the said franchise and rights. He further contended that the question raised in the action might and should have been brought forward (if at all) as part of the subject in contest in the action of *Attorney-General* v. *Horner* (1), and that as those questions were not raised in that action it would be inequitable and oppressive to allow them now to be raised, and that they should be treated as res judicata in the said action; and, on the appeal, in the alternative, and if the Court would not presume a lost charter, the defendant said that as far back as living memory extended the market had been carried on on the streets in question without interruption upon all days of the week except Sundays; that this de facto market must be presumed to have been carried on previously to the date of King Charles's charter and at all times subsequent thereto, and before the dedication of any of the streets to the public; and that it must be presumed that they were

(1) 14 Q. B. D. 245; 11 App. Cas. 66.

dedicated subject to user for the purposes of the market, or to the rights of the owner of the market estate to carry on the de facto market thereon.

The following statement of facts is taken from the judgment of Cozens-Hardy M.R.

In 1682 Charles II. granted to John Balch and his heirs a right to hold two markets every week on Thursday and Saturday in or near ("in sive juxta") Spittle Square, in the parish of Stepney. There are general words as to tolls, piccage, stallage, and other profits, advantages, and emoluments. Although I cannot say it is admitted that there was no market on this spot before the charter, I think it is absolutely clear that the charter was the sole foundation of the market. At the date of the charter Spittle Square was a rectangular piece of land not built over, and by virtue of a lease dated in 1672, for a term of eighty years, it could not be built over by the lessees, but had to be kept as open ground. In 1683 proceedings were taken in the Court of Chancery in order to provide for erecting a market thereon, and by a decree of February 23, 1684, the lessees were relieved from the obligations of the covenant and authorized to build any buildings they should think fit. At some subsequent date, but before 1688, the two markets on Thursday and Saturday were established. In that year the then owner of the franchise right obtained from James II. the grant of a market on Monday, Wednesday, and Saturday, the Thursday market being abolished. It was held in this Court, and in the House of Lords, in *Great Eastern Ry. Co.* v. *Goldsmid* (1), that the charter of James II. was invalid, but that under the charter of Charles II. there was a good title to a market on two days, namely, Thursday and Saturday. In 1742 a writ of "ad quod damnum" was issued to ascertain whether it would be to the damage of the King, or the injury of neighbouring markets, if the King should grant to Robert Moore, who was then owner of the Spittle Market, a market to be held on Tuesdays and Thursdays in every week. The City Corporation opposed the grant, and they succeeded in their opposition to this extent, that the inquisition found that the grant sought by Moore would not be prejudicial, if limited to

(1) (1883) 25 Ch. D. 511; (1884) 9 App. Cas. 927.

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roots, herbs, and garden stuff. There is produced from the Record Office a copy of a petition presented by Moore, which recites the charter of James, and that the markets for three days had been observed and kept ever since the grant, and that in consequence of the demolition of Stocks Market, which had been held on Tuesdays and Thursdays, it was desirable that a grant should be made to Moore of a franchise for Tuesday and Thursday, and that Moore was satisfied with the inquisition above referred to, and he petitioned for a limited grant accordingly. No grant was in fact made, and, so far as appears, nothing was done upon the petition except to refer it to the Attorney-General.

The title is traced throughout the eighteenth century. It is sufficient to say that the deeds do not define accurately the nature or origin of the franchise right. Sometimes the words used are "market or franchise," but there is never an express reference to the charter of Charles. The deeds all convey the market estate as well as the franchise market.

The defendant Horner was an assignee of a long lease of the market granted in 1787, and he subsequently in 1883 obtained a reversionary lease for a term which will expire in 1966. So far as living memory goes, the lessees of the market have assumed to exercise market rights, and to take toll and other dues, on every day of the week, except Sunday, and Horner claims the right so to do. On each day of the week there was a certain overflow from the market square. In these circumstances, the Attorney-General, at the information of the Whitechapel District Board, commenced an action against Horner claiming an injunction to restrain him from exercising market rights over any of the four streets now surrounding the market square, or over any of the four streets passing through the market square. It was held in *Attorney-General* v. *Horner* (1) by the Court of Appeal, reversing Stephen J., that the franchise rights were capable of being exercised not only in but near the market square, and this was affirmed by the House of Lords. The contention of Horner was that by reason of long uninterrupted user a lost grant of a market to be held on Monday, Tuesday,

(1) 14 Q. B. D. 245; 11 App. Cas. 66.

Wednesday, and Friday ought to be presumed. But this contention was clearly overruled by each member of this Court, namely, Lord Esher M.R., Cotton L.J., and Lindley L.J., and by the order of the Court of Appeal dated November 4, 1884, directing judgment to be entered for the defendant with costs, these words were added: "Except so far as the costs have been occasioned by the defendant claiming to exercise his market rights on all days other than Thursday and Saturday." It is quite clear that this is binding upon us, unless it can be suggested that doubt was thrown upon it by the House of Lords; but there is not a word to that effect, and, indeed, the case was there decided upon a different ground. In my opinion it is impossible for us to listen to any argument based upon a lost grant from the Crown. It was, however, held by this Court, and by the House of Lords, that the franchise rights on Thursday and Saturday might justify what would otherwise be an obstruction of the streets, but it was pointed out by Lord Selborne that upon the pleadings no distinction was drawn between franchise days and non-franchise days, or between one part of the street and another part of the street, and on this ground the Attorney-General's appeal was dismissed. I should add that there is no evidence as to the precise date at which either the internal or the surrounding streets were dedicated to the public, although it must have been before the twelfth of George III., in which year a statute authorized certain commissioners to pave and repair these streets. Lord Selborne assumed that the streets were laid out at the same time as the market was formed, but however probable that may be, I do not base my judgment upon it.

The evidence satisfies me that, so far as living memory extends, there have been obstructions every day in the week, not merely in the surrounding streets, one of which has been considerably widened in recent years, but also in streets somewhat more distant, and that Horner and his predecessors have exercised alleged market rights on every day, and in every such place. There is no evidence of the ownership of the streets, but there may be the usual presumption that a moiety of each street belongs to the adjacent owner.

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Warrington J. held, following *Attorney-General* v. *Horner* (1) and *Great Eastern Ry. Co.* v. *Goldsmid* (2), that the Court could not in the circumstances of this case presume a lost grant, and that the franchise was confined to Thursday and Saturday, the days mentioned in the charter of Charles II. His Lordship also held that so far as the commuted tolls were concerned there had been no excess of the franchise. As regarded the casual tolls his Lordship was of opinion that none of the tolls taken by the defendant were shewn to be unreasonable in amount, and that that charge against him failed. As to the charges of exacting tolls illegally for other reasons than that of amount, the most important of those was that of taking tolls from sellers and not from buyers. The general rule of law was that a toll was payable by the buyer and not by the seller. In the present case his Lordship was prepared to infer from the invariable custom of this market an agreement between the sellers and the lord of the market that for their mutual convenience the sellers should pay the toll in place of and on behalf of the buyers. The taking tolls on goods the bulk of which was not brought to the market but which were sold by sample was illegal. This, however, had been done in only a few cases and had been discontinued of late years, and although a technical excess of the franchise, no injunction would be granted. As to sales by auction the sum paid was not a toll, but a conventional payment for the services rendered by the defendant in permitting and facilitating the auction. That charge failed. The taking of toll on goods not even exposed for sale but merely brought within the precincts of the market was of course wrong, but the matter was exceedingly trivial and should be dealt with in the same way as in the case of sales by sample. There would therefore be a declaration that the holding of the market on days other than Thursday and Saturday was unlawful. As regarded the streets, his Lordship declared that the defendant was not entitled to make any use of the streets adjoining the market place for any purpose of the market on any day other than Thursday and Saturday, and there would be an injunction restraining the defendant from

(1) 14 Q. B. D. 245; 11 App. Cas. 66.

(2) 25 Ch. D. 511; 9 App. Cas. 927.

holding the market in those streets on days other than Thursday and Saturday. There would also be a declaration that the defendant was not entitled to take any tolls in respect of goods sold either by means of samples or in some other manner without being actually brought into the market, or in respect of goods merely brought into or exposed for sale in the market. The action would be dismissed so far as the relief claimed had not been granted. The plaintiffs were, however, entitled to the costs of the action other than those relating to the part in which they failed. These must be paid by the relators, and there would be a set-off.

The defendant appealed, and the plaintiff gave notice of a cross-appeal on the question of taking tolls from sellers.

Upjohn, K.C., *Gore-Browne*, K.C., and *S. R. Earle*, for the appellant. First we are entitled to a six days' market with a right to overflow into the streets surrounding the market on those days. If, however, the Court is of opinion that by the charter of Charles II. our right to hold markets is confined to two days only, namely, Thursday and Saturday, then we say, secondly, we have a proprietary market for the four other days, and that the streets surrounding the market were dedicated to the public subject to our charter market and also our proprietary market; and thirdly, if the Court is against us on the first two points, we contend that inasmuch as the Attorney-General has stood by and allowed the market to overflow into these streets for so long a time no injunction ought to be granted.

On the first point we ask the Court to presume the existence of a lost grant covering the days (except Sundays) not mentioned in the charter of Charles II. and allowing the use of the streets juxta the market. In *Attorney-General* v. *Horner* (1) it was decided that the charter of Charles II. gave the right to an overflow market or, as it was there expressed, an expansive market. In that case there was oral evidence going back for thirty or forty years shewing that the market had been held every day in the week and that it had overflowed into the surrounding streets. Unless that usage was legal or could be justified by charter it was criminal.

(1) 14 Q. B. D. 245; 11 App. Cas. 66.

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The taking of tolls without a charter would be a usurpation of the Royal prerogative and would be criminal. No one suggests that during the whole time the overflow market was held and tolls taken on non-charter days any one complained or took any proceedings against the market owner. Under these circumstances the Court will, it is submitted, presume that the taking of these tolls was not done in usurpation of the Royal prerogative, but was done in pursuance of a legal right. It will therefore presume such a charter as would legalize what would otherwise be an illegal obstruction of the highway. The authorities with reference to nuisance from obstruction of highways are discussed by North J. in *Barber* v. *Penley*. (1) The Court is bound to find a means of legalizing the user in the present case. The difficulty Warrington J. felt in the case was this, that having the charter before him he knew the origin of the user, and consequently he declined to infer any other origin and held that the user was merely an extension of the charter. But it is submitted he only knew the origin of a part of the user. In *Powell* v. *Milbanke* (2) a grant from the Crown of the right of presentation to a curacy was presumed though within time of memory. There the Crown grant was produced and an enjoyment was proved beyond it, and it was presumed by the Court that there was another grant conveying the excepted advowson. That case is analogous to the present. In *Bedle* v. *Beard* (3) an additional grant of an advowson was presumed. The Court there presumed another paper title which made everything right. In *Eldridge* v. *Knott* (4) Lord Mansfield said: "There are many cases not within the statute, where from a principle of quieting possession the Court has thought that a jury should presume any thing to support a length of possession."

[COZENS-HARDY M.R. In that case Lord Mansfield seems to think that the presumption is one not of law but of fact.

Danckwerts, *K.C.*, referred to *Dalton* v. *Angus*. (5)]

The doctrine of the presumption of a lost grant is really judge-made law introduced for the purpose of correcting the common

(1) [1893] 2 Ch. 447.
(2) (1772) 1 Cowp. 103, n.
(3) (1607) 12 Rep. 5.
(4) (1774) 1 Cowp. 214, 215.
(5) (1881) 6 App. Cas. 740.

law as to prescription, which was considered too hard and fast.

[COZENS-HARDY M.R. After the decision of the Court of Appeal in *Attorney-General* v. *Horner* (1) this point is not open to the appellant in this Court.]

Then the second point is that, even on the footing of there being no franchise for the other four days of the week, and therefore the market carried on upon those four days being a private market only, the evidence calls upon the Court to presume a dedication of the highways subject to the user for the purpose not only of the franchise market but also of the private market. The Court finds upon the evidence that for nearly a century past there has been upon the four days in fact an overflow of the private market, which was wrongful unless the Court will presume a dedication or other authority which is necessary to justify the usage of a century. It is said that the plaintiff must prove a dedication by the owner of the streets outside the market at a time when the market was in existence and was overflowing, and reserving or making it a condition of the dedication that it should be subject to the right of overflow in respect of the private market as well as in respect of the franchise market. But it is not necessary for him to do that. If he proves a usage to have continued as long as the memory of living witnesses, and that that usage, unless something can be presumed to authorize and justify it, is an illegal usage, then he has discharged the burden of proof which is upon him, and it is for the Court to presume that legal origin which is capable of existing, namely, that when the streets in question were dedicated the dedication was subject to a condition that they might be used in respect of an overflow not only of the charter market but also of the private market on the non-charter days: *Bedle* v. *Beard*. (2) That there may be a dedication to the public subject to some condition or qualification is clear from *Fisher* v. *Prowse* (3) and *Mercer* v. *Woodgate*. (4) If there is satisfactory evidence of old-established usage going back as far as the memory of living witnesses, and if by legal ingenuity of Bench or Bar a lawful origin, legally possible, can be discovered for the

(1) 14 Q. B. D. 245.
(2) 12 Rep. 5.
(3) (1862) 2 B. & S. 770.
(4) (1869) L. R. 5 Q. B. 26.

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usage, then it is the duty of the Court to make that presumption: *Hull Corporation* v. *Horner*.(1) In *Slade* v. *Drake* (2) Lord Hobart says: "For whereas prescription and antiquity of time fortifies all other titles and supposeth the best beginning that law can give them." Here the Court is asked from the antiquity of time to fortify the appellant's title by supposing that beginning which is legally possible to maintain the usage. The law is similarly stated by Buller J. in *Read* v. *Brookman*.(3) The matter is also dealt with by Lord Erskine L.C. in *Hillary* v. *Waller*.(4) See also *Halliday* v. *Philipps* (5), which is a stronger case than the present. There Bowen L.J. said this: "It seems to me that there is hardly any principle more important in English law for a Court of justice to insist upon and enforce, than the principle that we ought to support quiet, ancient, and long possession by preventing those who, by themselves or their predecessors, have for a long time been in open enjoyment as of right, from being driven into difficulties and forced to hunt up and produce at their peril, proof of the way in which their rights first began." This case falls absolutely within that principle. *Penryn Corporation* v. *Best* (6) and *Lawrence* v. *Hitch* (7) both illustrate the same principle.

Goodman v. *Saltash Corporation* (8) affords a strong instance of the extent to which the Court will under proper circumstances go in making a presumption, and in *Dalton* v. *Angus* (9) the question of validating long usage was much discussed. See also *Mercer* v. *Denne* (10); *Bryant* v. *Foot* (11); *Roe* v. *Ireland* (12); *Attorney-General* v. *Simpson* (13); *Merttens* v *Hill* (14); *Lord Rivers* v. *Adams* (15); *Harris* v. *Earl of Chesterfield*.(16) These authorities establish the proposition that where it is proved to the satisfaction of the Court that there has been a

(1) (1774) 1 Cowp. 102.
(2) (1618) Hob. 295, 297.
(3) (1789) 3 T. R. 151.
(4) (1806) 12 Ves. 239.
(5) (1889) 23 Q. B. D. 48, 52; [1891] A. C. 228.
(6) (1878) 3 Ex. D. 292.
(7) (1868) L. R. 3 Q. B. 521.
(8) (1882) 7 App. Cas. 633.
(9) 6 App. Cas. 740.
(10) [1905] 2 Ch. 538, 577.
(11) (1867) L. R. 2 Q. B. 161, 179.
(12) (1809) 11 East, 280.
(13) [1901] 2 Ch. 671.
(14) [1901] 1 Ch. 842.
(15) (1878) 3 Ex. D. 361.
(16) [1911] A. C. 623.

usage, extending throughout the memory of living witnesses, of a character which unless justified is unlawful (and which presumably would have been stopped by process of law), then it is the duty of the Court to look into the case from the point of view of justifying the usage, if possible in law, and for that purpose to presume such an origin as will (within the law) validate and establish that usage.

The presumption which we ask the Court to make with regard to the non-franchise business is exactly the same as that which was made by the House of Lords with regard to the franchise market. Assuming that the Court is against us on the question of raising any presumption, then it is submitted that no injunction ought to be granted in such a case as this where the enforcing of it would materially injure a large section of the public. The reasons given by Lord Esher in *Attorney-General* v. *Horner* (1) apply a fortiori in this case. But the Court has no discretion in this matter. If there is a reasonable probability of a legal origin of these tolls the Court is bound to infer a legal origin for them: *Foreman* v. *Free Fishers and Dredgers of Whitstable* (2); *Goodman* v. *Saltash Corporation.* (3)

[HAMILTON L.J. referred to Theobald on Land, p. 158.]

Lawrence v. *Hitch* (4); *Harris* v. *Earl of Chesterfield.* (5) This point is not covered by the earlier decision in *Attorney-General* v. *Horner.* (6)

[COZENS-HARDY M.R. referred to *Manchester Corporation* v. *Lyons.* (7)]

That is inconsistent with *Penryn Corporation* v. *Best.* (8)

Danckwerts, K.C., Cave, K.C., C. H. Sargant, and *Sir P. Baker-Wilbraham, Bart.,* for the plaintiffs, were stopped on the question of the presumption of a lost charter for a daily market and as to whether an injunction ought to be granted, assuming that Warrington J.'s decision on those points was right. They continued: The easement claimed cannot be supported as an

(1) 14 Q. B. D. 245, 256.
(2) (1869) L. R. 4 H. L. 266.
(3) 7 App. Cas. 633.
(4) L. R. 3 Q. B. 521.
(5) [1908] 2 Ch. 397; [1911] A. C. 623.
(6) 14 Q. B. D. 245; 11 App. Cas. 66.
(7) (1882) 22 Ch. D. 287, 306.
(8) 3 Ex. D. 292.

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easement appurtenant to land, unless its enjoyment relates to the enjoyment of the land: *Ackroyd* v. *Smith* (1); *Bailey* v. *Stephens*. (2) Such a right can be of no benefit to the market estate. This point also is covered by *Attorney-General* v. *Horner*. (3) The Court will not infer a lost grant where there is an explanation of the circumstances: *Attorney-General* v. *Simpson* (4); *Griffith* v. *Matthews* (5); *Lord Rivers* v. *Adams* (6); *Chamber Colliery Co.* v. *Hopwood* (7); *Labrador Co.* v. *Reg.* (8); *Attorney-General* v. *Antrobus* (9); *Gardner* v. *Hodgson's Kingston Brewery Co.* (10); *Hull Corporation* v. *Horner*. (11) The obstruction has grown up recently and the presumption of an easement is quite unnecessary.

The physical characteristics of the locality must be taken into consideration. We tender in evidence three maps which are in the custody of the British Museum and the Corporation of the City of London. The first is a map of 1677 described in the dedication as an actual survey made by John Ogilby and William Morgan and dedicated to the Lord Mayor by William Morgan, His Majesty's cosmographer. We can prove that Ogilby died in 1676, which fixes the date, and the Term catalogues of 1676 advertise the map as sold by Morgan and the price is given. On the map are the armorial bearings of Sir J. Sheldon, who was Lord Mayor in 1675—76. The officer in charge of maps at the British Museum produces another copy of this map. He can only prove that it must have been in the Museum before 1820. He also produces a second map published in 1681—82 described as a map of London actually surveyed by Sir William Morgan. The third map is dated in 1703 and is at the Guildhall Library. It is called Gascoigne's Map of Stepney. [Witnesses from the Guildhall Library and the British Museum were called to prove the above facts.] Public rights are in question and evidence of reputation is admissible. These maps are declarations by deceased members of the public whose interests might be affected

(1) (1850) 10 C. B. 164.
(2) (1862) 12 C. B. (N.S.) 91.
(3) 14 Q. B. D. 245; 11 App. Cas. 66.
(4) [1901] 2 Ch. 671, 697.
(5) (1793) 5 T. R. 296.
(6) 3 Ex. D. 361.
(7) (1886) 32 Ch. D. 549.
(8) [1893] A. C. 104.
(9) [1905] 2 Ch. 188.
(10) [1903] A. C. 229.
(11) 1 Cowp. 102.

and who must be assumed to have made inquiries before putting forward these maps. The maps come from the proper custody and any member of the public can inspect them. They are admissible although their weight as evidence may be another matter: *Attorney-General* v. *Antrobus* (1); *Trafford* v. *St. Faith's Rural Council* (2); *Vyner* v. *Wirral Rural Council.* (3)

Upjohn, K.C. These maps are not admissible as evidence. No doubt evidence of reputation is admissible, but these maps are tendered as evidence not of reputation but of particular facts. Hearsay evidence is good evidence of reputation in matters of public interest, but not of particular facts from which an inference of fact may be drawn in respect of individual rights: *Reg.* v. *Bliss* (4); *Reg.* v. *Berger* (5); *Mercer* v. *Denne* (6); *Pipe* v. *Fulcher.* (7) There is nothing to shew that these maps are reliable: *Hammond* v. *Bradstreet* (8); *Mercer* v. *Denne* (9); *Reg.* v. *Inhabitants of Milton.* (10)

Cave, K.C., in reply on this point.

Cozens-Hardy M.R. Overborne by the weight of authority, and contrary to my own individual opinion as to what would be reasonable and just, I feel bound to reject these maps. The question which arises before us at this stage of the argument is, what was the condition of this property at the date of the charter of Charles II., 1682? One would have thought, that being a matter as to which living evidence cannot be given, the Court might look at any contemporary maps and admit them for what they were worth in order to inform itself of that which after all is a matter of history. The question is, on this branch of the case, whether there were public highways around the Spitalfields Market. I can conceive that there might be some book written in the reign of Charles II. or James II. describing the property, and saying, as part of the narrative, what the streets were around it; and it does seem very strange that in a

(1) [1905] 2 Ch. 188, 203.
(2) (1910) 74 J. P. 297.
(3) (1909) 7 L. G. R. 628.
(4) (1837) 7 Ad. & E. 550.
(5) [1894] 1 Q. B. 823.
(6) [1904] 2 Ch. 534; [1905] 2 Ch. 538, 561.
(7) (1858) 1 E. & E. 111.
(8) (1854) 10 Ex. 390.
(9) [1904] 2 Ch. 545.
(10) (1843) 1 Car. & K. 58.

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case where reputation is admitted a book of that kind would not be admissible. We have no book, except so far as one of the books attached to the map can be called a book, but we have maps the date of which is fixed, one just before the grant of the charter, one after, and another in 1703. We have no information on the point as to whether the man who made any one of these maps had any special knowledge of the locality, or that he had any special duty to discharge in making these maps. He seems to have been a man who was publishing maps as a private adventurer. On one of the maps, if not more than one, there is the price at which any one might buy it. The decisions of this Court to which our attention has been called, particularly the cases of *Pipe* v. *Fulcher* (1) and *Hammond* v. *Bradstreet* (2), seem to me to lay down a rule which is absolutely binding on us, that in a matter of this kind, where the issue is public highway or not, you cannot produce a map as equivalent to a statement by an individual of a particular fact relating to the property when it does not purport to be a statement of reputation. Let me give one instance which illustrates the difficulty in the present case. We have looked at the maps de bene esse in order to inform ourselves. I see on that map two lines which indicate certainly that there were no buildings in the lines which are laid down. I see something which indicates that there were houses on one side of the street; I see something to indicate that there were some trees on what is now the market site; I see something to indicate that the market site was then vacant land; but those are all particular facts. They are not, except in the most indirect way, available as evidence of reputation. There is nothing to justify the inference that these maps were anything more than a statement made by the man who prepared the maps, whether with knowledge or without knowledge, that he found a vacant space with houses on one side and some trees on the other side of the road. Speaking individually, with great regret that we are not allowed to get such light, it may be but little, but such light as is possible, in dealing with a matter more than two hundred years old, I am bound to say, according to the authorities, that these plans are not admissible.

(1) 1 E. & E. 111. (2) 10 Ex. 390.

BUCKLEY L.J. With very great regret, I feel myself constrained by authority to agree. But for authority I confess I should have thought on the question of reputation I could have looked at these documents for the purpose of seeing whether the delineation did not indicate a public highway on the spot in question. But on authority, I must resist that temptation.

HAMILTON L.J. I agree. On the first point, namely, that there is no sufficient evidence to shew the competence of these map makers to speak, we are bound by what is said in *Hammond* v. *Bradstreet* (1), and it would be undue refining to endeavour to distinguish the qualifications of Ogilby and Morgan from the qualifications of Joshua and William Kirby in that case. The proposition of Cave J. in *Reg.* v. *Berger* (2), that inasmuch as the map was made by one of the public it could not be excluded, when tendered in evidence on the point whether the Great North Road was or was not a public highway, is too wide; it was unnecessary for the decision of the case, and goes too far. With regard to the suggestion that this map could be relied upon as evidence of a particular fact, namely, the existence of some sort of track, I think that the rule is as stated by Wightman J. in *Pipe* v. *Fulcher* (3), that although hearsay evidence of reputation is admissible to prove a public right of highway, you cannot by hearsay evidence prove the preliminary fact that there is a way; and whatever may be the rule as to the admission of ordnance survey maps to prove the existence of a visible track at the time of the survey, as held by Farwell J. in *Attorney-General* v. *Antrobus* (4), there is none which would admit maps, as such, as physical delineations of the surface of the ground without some more proof than their mere production. As to the suggestion that these maps might be relied upon as having become public documents because they come out of the custody of the Guildhall librarian and the British Museum librarian, these facts in themselves do not make them public documents, as documents belonging to one of the departments of the State would be; nor do they take the place of that open reliance on the document by

(1) 10 Ex. 390.
(2) [1894] 1 Q. B. 823.
(3) 1 E. & E. 111.
(4) [1905] 2 Ch. 188.

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persons interested, which may supply competence by reputation where the original cartographer had none. After all, both those libraries acquire books by purchase, and, although invaluable to students, can hardly be said to challenge public comment so far as to make the fact of the map being in their possession evidence that the public has recognized the correctness of the map. I think it is necessary to add that the decision of Neville J. in *Trafford* v. *St. Faith's Rural Council* (1) is not in accordance with the older authorities, one of which, namely, *Hammond* v. *Bradstreet* (2), was not cited to him. There is an expression of the Lord Chief Justice in *Vyner* v. *Wirral Rural Council* (3) which I should desire to reconsider before I could accept it, namely, that the question whether the maps were made by a person who knew anything about the matter goes more to the weight of the evidence than to its admissibility. Generally I quite agree that I should desire to know the historical evidence about Spitalfields, which for every purpose, except that of deciding the issue as to property between private persons, nobody would think of excluding; but I yield to authority on the law of evidence without reluctance, because I am satisfied that in the main the English rules of evidence are just, and I am satisfied also that there is no portion of the English law which ought more rigidly to be upheld. My experience is that the public have in the result derived great benefit from their strict application.

Care, *K.C.*, in continuation. The defendant's claim to overflow into the streets and take tolls in respect thereof has always been made as part of the franchise under the charter of Charles II., but there was no justification for doing so. *Cork Corporation* v. *Shinkwin* (4) does not apply to this point, for there is no suggestion here that fees were paid as compensation for disturbing the market.

[He then went through and discussed the defendant's title deeds, and referred to 12 Geo. 3, c. 38, s. 13, 28 Geo. 3, c. 60, ss. 11, 13, and continued:] This Act could not have been passed if there had been a valid existing easement supporting the right to

(1) 74 J. P. 297.
(2) 10 Ex. 390.
(3) 7 L. G. R. 628.
(4) (1825) Sm. & Bat. 395.

overflow. The point has been decided in *Attorney-General* v. *Horner* (1), and we cannot contend in this Court that we can destroy the franchise rights without compensation. There is evidence that one of the streets has been widened under 3 & 4 Vict. c. 87. The Court will not infer a grant of an easement to overflow; the user has grown up recently. It is impossible to shew to what part of the dominant tenements such an easement could attach and it has never been defined.

We ask to be allowed to read a State paper which comes from the Public Record Office, namely, a copy of the petition of Robert Moore for a licence to hold a market on Tuesdays and Thursdays. It is in the "Petition Entry Book, Home Office," now the Public Record Office. Under the Public Record Office Act, 1838 (1 & 2 Vict. c. 94), s. 13, it is unnecessary to bring the original into Court, and the copy is tendered as evidence from which the loss of the original petition might be inferred. We prove that it was the practice for copies of petitions to be entered in the State papers, Domestic Series Entry books, together with a minute of what was done on them.

The copy of the petition in question was in vol. 260; the original petition was always authenticated by the signature or the attested mark of the petitioner, but on the copy memorial in question there was no copy of the signature by Moore; a search has been made through the bundles of State papers from January, 1741, to December, 1742 (the petition was dealt with in July, 1742), and the original of Moore's petition has not been found; the copies of other petitions have been compared with the originals and they have been found to be very carefully copied.

Upjohn, K.C., for the appellant. This copy is not admissible. If an instrument be destroyed or lost the party who seeks to give secondary evidence of the contents must, to begin with, give some evidence that the original once existed: Taylor on Evidence, 10th ed. vol. i. p. 330, pl. 429; *Fisher* v. *Samuda* (2); *Everingham* v. *Roundell* (3); *Doe* v. *Wittcomb*. (4) The Attorney-General has produced no such evidence. He must prove the existence of

(1) 14 Q. B. D. 245; 11 App. Cas. 66.
(2) (1808) 1 Camp. 190, 193.
(3) (1838) 2 Mood. & Rob. 138.
(4) (1853) 4 H. L. C. 425.

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the original and that it emanated from Moore. Further, for a copy to be admissible it must have been examined with the original and the accuracy of the copy must be proved. That has not been done in this case, and the evidence shews that this is not a true copy, for it does not contain any signature, and the practice was invariable for a petition to be authenticated by the signature or mark of the petitioner.

COZENS-HARDY M.R. We think the Record Office copy of the petition is admissible.

Danckwerts, K.C. The petition of Robert Moore in 1742 recited the charter of James II. and that the market had been held ever since on the three market days, Monday, Wednesday, and Saturday, and that upon the demolition of the Stocks Market (which stood on the site of the present Mansion House) the gardeners and farmers who used to sell their goods there came to the petitioner's market in Spittle Square, but as they had been accustomed to come to the Stocks Market on Tuesdays and Thursdays as well as Saturdays they were unwilling to alter their days from Tuesdays and Thursdays to Mondays and Wednesdays. That was the origin of the petition and shews that no market was then held in Spittle Square on Tuesdays and Thursdays. Moreover in *Attorney-General* v. *Horner* (1) Horner did not claim any market on days other than the charter days and expressly repudiated any such claim, and his defence and the documents were quite inconsistent with the holding of such a market. A comparison of the tolls before Horner bought with those received by him shews such a sudden increase in amount as to lead to the inference that it was not until Horner's time that the extraordinary excess in the number of people coming to the site of the market occurred. What probably then happened was that Horner having adjoining land invited the excess of people to bring their goods on to his adjoining land and sell them there, and that this was done, irregularly as we say, until it became a nuisance and resulted in *Attorney-General* v. *Horner*. (1)

Having regard to the facts and to the law as laid down in *Attorney-General* v. *Horner* (1) and *Great Eastern Ry. Co.* v.

(1) 14 Q. B. D. 245; 11 App. Cas. 66.

Goldsmid (1) it is not possible for the Court to infer that there was any practice from which a lawful origin could be presumed. Any such derogation from the public right of using the streets must have been something which had its origin in a lawful operation, and an operation in fact before the dedication of the streets. In *Attorney-General* v. *Horner* (2) Lord Selborne suggested that the streets had been dedicated not later than 1693. But such a reservation, to be valid, must have been in favour of the person dedicating the streets and not in favour of a third person. In favour of a third person it could only be a grant in gross, and not of anything appurtenant, which would be illegal. A dedication subject to such a right is inconceivable. The right must have been something capable of being annexed to the occupation and enjoyment of, and passing along with, the market estate; if in gross it could not do so; neither was it appurtenant. The case would be different if it were protected by a grant of a franchise market covering the street, but it is not. The law cannot draw a presumption unless it has some substratum of fact to work upon, as, for instance, long enjoyment in respect of some right known to the law. That was the case in *Halliday* v. *Philipps* (3); *Duke of Norfolk* v. *Arbuthnot* (4); *Goodman* v. *Saltash Corporation* (5); *Lawrence* v. *Hitch.* (6) In *Hull Corporation* v. *Horner* (7) and *Eldridge* v. *Knott* (8) Lord Mansfield deals with the whole question of presumption as a question of fact. It is only in cases where there is no explanation that there is any need to resort to presumption: *Attorney-General* v. *Simpson* (9); *Attorney-General* v. *Antrobus* (10); *Gardner* v. *Hodgson's Kingston Brewery Co.* (11); *Griffith* v. *Matthews* (12); *Doe* v. *Millett* (13); *Harris* v. *Earl of Chesterfield* (14); *Labrador Co.* v. *Reg.* (15)

Bedle v. *Beard* (16) does not really support any argument that has been put forward on behalf of the appellant. It is a decision

(1) 25 Ch. D. 511; 9 App. Cas. 927.
(2) 14 Q. B. D. 245; 11 App. Cas. 66.
(3) 23 Q. B. D. 48; [1891] A. C. 228.
(4) (1880) 5 C. P. D. 390.
(5) 7 App. Cas. 633.
(6) L. R. 3 Q. B. 521.
(7) 1 Cowp. 102.
(8) 1 Cowp. 214.
(9) [1901] 2 Ch. 671.
(10) [1905] 2 Ch. 188.
(11) [1903] A. C. 229.
(12) 5 T. R. 296.
(13) (1848) 11 Q. B. 1036.
(14) [1911] A. C. 623.
(15) [1893] A. C. 104.
(16) 12 Rep. 5.

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of very doubtful authority, as appears from Serjeant Hill's note referring to the resolution of the Court in 10 Coke, 64a.

[HAMILTON L.J. referred to the statement by Mr. Hargrave at the beginning of the 12th part of Coke's Reports, to the effect that the 12th part was of small authority, being posthumous and apparently nothing more than a collection from papers neither digested nor intended for the press by the writer.]

The materials of these roads were vested in the local authority by the Paving Acts in the reign of George III., and under s. 96 of the Metropolis Management Act, 1855, the vesting is an absolute vesting: *Coverdale* v. *Charlton* (1); *Rolls* v. *Vestry of St. George the Martyr, Southwark* (2); *Westminster Corporation* v. *Johnson*. (3) The lessees of the market lost any right as proprietors of the soil to deal with the soil in derogation of any street rights when the Paving Acts were passed, and the usage in question can no longer be referred to any ownership of the soil on their part. The difficulty of presuming a legal right which can pass along with the estate over the part of the street which was not that of the owner of the market is quite insuperable.

A right to obstruct the surface of a highway is necessarily inconsistent with dedication of a right of passage, but the owner retains all other rights of ownership in the soil: *Lade* v. *Shepherd* (4); and in the enjoyment of his right of ownership in the soil he may, for instance, plough up a footpath: *Arnold* v. *Blaker* (5); but that reservation is peculiar to himself, and if before the dedication he allows the public to collect and stay on the surface of his land, that is a mere licence which, not being coupled with an interest, is revoked by dedication. The people who come and stay upon the streets surrounding the market come as members of the public, and Horner can no longer maintain trespass against them because the surface is no longer in him. That was why so much stress was laid upon the words "sive juxta" in *Attorney-General* v. *Horner* (6) and in *Great Eastern Ry. Co.* v. *Goldsmid* (7), because it was recognized that

(1) (1878) 4 Q. B. D. 104.
(2) (1880) 14 Ch. D. 785.
(3) [1904] 2 K. B. 737.
(4) (1735) 2 Str. 1004.
(5) (1871) L. R. 6 Q. B. 433.
(6) 14 Q. B. D. 245; 11 App. Cas. 66.
(7) 25 Ch. D. 511; 9 App. Cas. 927.

the only right to hold a market in the streets must be in connection with the franchise.

The point now raised was never raised in the pleadings or during the trial of *Attorney-General* v. *Horner* (1), and the evidence in that case, although admissible on the question of a lost grant, is not admissible on the point raised by the amendment in this case, the issue in the present and in the earlier case not being the same so far as this point is concerned: *Lawrence* v. *Maule.* (2) The evidence of usage is so modern that no presumption can be drawn from it at all. Down to 1874, as appears from the particulars of sale, the amount taken in tolls was small, averaging about 750*l.* per annum between 1868 and 1874. In 1881 they rose to 2000*l.*, in 1898 to 15,000*l.*, in 1901 to 20,000*l.*, in 1904 to 24,000*l.*, and in 1905 to 25,000*l.*, shewing an enormous increase in the user of the market. Moreover, when Horner bought in 1875, many of the market houses were not used for market purposes, and that increases the difficulty of presuming a dedication of the streets for the purposes of a market under the altered grant. Having regard to the title under which Horner purchased and to all the facts, it is not possible to presume that there was such an extraordinary grant, a grant which can have no existence in law: *Ackroyd* v. *Smith* (3); *Bailey* v. *Stephens.* (4)

Upjohn, K.C., in reply. On the hypothesis that the sites of the external streets and the land beyond belonged to some persons other than the owners of the market estate, the appellant asks the Court to presume that those persons granted to the owners of the market estate, their lessees and tenants occupiers of the estate, a right in perpetuity appurtenant to the market estate to carry on the market on the sites and streets and highways which are in question, and to have done that before any dedication to the public, so that any subsequent dedication was subject to the rights under that previous grant of an easement. We do not dispute the law as laid down in *Ackroyd* v. *Smith* (3) and *Bailey* v. *Stephens.* (4) It was established upon the reasoning of Lord Selborne in *Attorney-General* v. *Horner* (1) that such an easement

(1) 14 Q. B. D. 245; 11 App. Cas. 66.
(2) (1859) 4 Drew. 472.
(3) 10 C. B. 164.
(4) 12 C. B. (N.S.) 91.

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may exist; and it could only be by virtue of a grant made by the owner of the servient tenement, because the Crown in granting a franchise has no right to affect any man's private ownership or private possession or occupation. The easement would be granted to the owner of the land on which the franchise market was held and would enable the acts authorized by the franchise to be done upon the lands of the grantor by way of necessary extension of what was being done on the dominant tenement.

In the case both of a franchise market and a de facto market it is an important element in the utility and enjoyment and value of the dominant tenement to have an easement over the surrounding land by virtue whereof, whenever the dominant tenement is inadequate in point of size for the business of authorizing buying and selling,—which is the business which a market owner carries on—that business may, by way of necessary extension of something which is being done on the dominant tenement, overflow on to the surrounding land. It is an obvious element of value to the dominant tenement not only on charter days, when, besides the advantage of the tolls, it insures all the conveniences necessary to attract and retain sellers and buyers, but also on non-charter days, because, although unable to take tolls, the market owner is in a position to prevent such an influx of people to the lands "juxta" on those days as would amount to the setting up of a rival market. That is shewn by *Great Eastern Ry. Co.* v. *Goldsmid.* (1) It is exactly the same easement whether there be a franchise or not. It is a mere overflow from a franchise market in the one case, and from a private or de facto market in the other. It has never been suggested that the charter right was a right to hold the market "juxta" but not "in"; it has always been referred to as a right "to overflow": per Lord Esher M.R. and Cotton L.J. in *Attorney-General* v. *Horner.* (2)

It was really decided by the House of Lords in *Attorney-General* v. *Horner* (3) that such an easement as we are asking the Court to presume can exist. See also *Lockwood* v. *Wood.* (4)

(1) 25 Ch. D. 511; 9 App. Cas. 927.
(2) 14 Q. B. D. 245, 255, 261.
(3) 11 App. Cas. 66.
(4) (1841) 6 Q. B. 31.

All that was decided in *Ackroyd* v. *Smith* (1) and *Bailey* v. *Stephens* (2) was that there cannot be an easement which is entirely unconnected with the tenement to which it is appurtenant. Here the right to overflow upon the streets is very valuable to the owner of the market estate to which it is appurtenant. This Court will not be astute to find that the easement is unconnected with the dominant tenement and therefore is bad. *Simpson* v. *Godmanchester Corporation* (3) may also be referred to on this point.

Again, upon the question whether there may be a dedication subject to the reservation of a private right the authorities shew that there may be dedication subject to such a right as we claim. Further they shew that if the owner of the land before dedication creates a right in some one else, then the subsequent dedication by him would be subject to the right so created. As to the way in which a dedication may be qualified, *Fisher* v. *Prowse* (4) and *Cooper* v. *Walker* (5) shew the principle. In *Mercer* v. *Woodgate* (6) it was held that there might be a dedication of a right of way over a field path subject to the right of the owner of the field to plough it up. The precise point occurred in *Arnold* v. *Blaker*. (7) The principle was applied in *Reg.* v. *Chorley* (8), which was not a case of physical obstruction existing at the time, but of a future user of the way which was to prevail over the user by the public. A similar instance is afforded by *Le Neve* v. *Mile End Old Town Vestry* (9), which shews that there may be dedication subject to much larger reservations than we are asking the Court to presume. *Grand Junction Canal Co.* v. *Petty* (10) and *Vestry of Chelsea* v. *Stoddard* (11) illustrate the same principle. In Pratt on Highways, 14th ed. p. 16, the dictum of Lord Campbell in *Reg.* v. *Charlesworth* (12) is said to be inconsistent with *Fisher* v. *Prowse* (4) and *Mercer* v. *Woodgate*. (6)

[BUCKLEY L.J. referred to *Morant* v. *Chamberlin*. (13)]

(1) 10 C. B. 164.
(2) 12 C. B. (N.S.) 91.
(3) [1897] A. C. 696.
(4) 2 B. & S. 770.
(5) (1862) 2 B. & S. 773, 779.
(6) L. R. 5 Q. B. 26.
(7) L. R. 6 Q. B. 433.
(8) (1848) 12 Q. B. 515.
(9) (1858) 8 E. & B. 1054.
(10) (1888) 21 Q. B. D. 273.
(11) (1879) 43 J. P. 782.
(12) (1851) 16 Q. B. 1012.
(13) (1861) 6 H. & N. 541.

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Upon the first alternative, namely, that of the site of the streets having been vested at the several times in the owners of the market place, the presumption which we ask the Court to make is that the dedication of the land for public user was subject to the right of overflow not only as to the chartered market, but also in connection with the non-chartered or proprietary market held on the other days of the week.

But if the Court should look at it from the other alternative, then there should be a presumption first of the grant of an easement in respect of the overflow, and secondly of a subsequent dedication to the public, subject to the rights conferred by the grant of the easement.

Danckwerts, K.C., Cave, K.C., C. H. Sargant, and *Sir P. Baker-Wilbraham, Bart.,* for the Attorney-General on the cross-appeal. The cross-appeal is confined to two points—(1.) that tolls cannot properly be taken from the sellers, and (2.) that the tolls taken by the market owner are rank and outrageous.

As to the first point Warrington J. was with us on the law, but he declined to make a declaration, holding that the defendant had not done anything illegal in taking tolls from the sellers, because having regard to the long usage in the market an agreement ought to be inferred between the market owner and the sellers that the latter should pay tolls in place of and on behalf of the buyers. We ask for a declaration and an injunction against taking toll as toll. It is the view of the Attorney-General that if people are not liable to pay tolls they ought to know it.

The authorities upon the point are all one way, namely, that apart from custom tolls cannot be taken from the sellers: *Prior of Bartholomew's Case* (1); Davies' Reports, p. 43 (under "Customs"); Gunning on Tolls, p. 45; Co. 2nd Inst., p. 221; Brooke's Abridgement, pt. ii. p. 266; Comyns' Digest, 5th ed. vol. v. p. 57, sub-tit. "Market" F; *Leight* v. *Pym* (2); *Austin* v. *Whittred* (3); Pease and Chitty on Fairs, p. 1 and p. 100 (*a*); *Heddy* v. *Wheelhouse* (4); *Duke of Bedford* v. *Emmett* (5); *Great*

(1) (1430) Year Book 9 Hen. 6, f. 45, pl. 28.
(2) (1686) 2 Lutw. 1329, 1386.
(3) (1747) Willes, 623, 628.
(4) (1596) Cro. Eliz. 558.
(5) (1820) 3 B. & Al. 366.

Eastern Ry. Co. v. *Goldsmid* (1); *Horner* v. *Stepney Assessment Committee* (2); *Rex* v. *Burdett.* (3) There is no authority the other way. That the practice cannot be justified by custom in this case is clear, for custom must be immemorial. Warrington J. found that there was some sort of convention or agreement between the market owner and the sellers. There is no evidence of that; moreover it is admitted that the defendant's practice has been to take tolls as tolls from the sellers at the market.

Upon the other point raised by the cross-appeal, that tolls must be reasonable is clear: *Stamford Corporation* v. *Pawlett* (4); *Gard* v. *Callard.* (5) Warrington J. found that the tolls were not unreasonable, but that finding was upon a wrong basis. He considered the matter from a commercial point of view, having regard to the expenditure by Horner upon the market premises. Again, there is no table of tolls in existence. Continuance of uniformity is an incident of reasonableness: *Lawrence* v. *Hitch* (6); *Duke of Newcastle* v. *Worksop Urban Council.* (7)

There is no such thing as a wholesale market. The general public are entitled to come in and buy for their own use, and the owner is bound to afford facilities. Horner might have been charged with extortion for blocking up the market place with stalls so that the public were compelled to use them: Pease and Chitty on Markets, p. 32; *Rex* v. *Burdett* (3); *Austin* v. *Whittred.* (8) Tolls must be reasonable and uniform — *Yarmouth Corporation* v. *Groom* (9); *Duke of Newcastle* v. *Worksop Urban Council* (10)—although the owner may forgo some of his rights: *Duke of Bedford* v. *Emmett.* (11) In this case no toll can be reasonable, for proper facilities are not given: *Northampton Corporation* v. *Ward* (12); *Norwich Corporation* v. *Swann* (13); Blackstone's Commentaries, vol. i. pp. 77, 78. The amount of the tolls to be paid ought to be fixed and published so that

(1) 9 App. Cas. 927.
(2) (1908) 6 L. G. R. 651.
(3) (1697) 1 Ld. Raym. 148.
(4) (1830) 1 Cr. & J. 57, 400.
(5) (1817) 6 M. & S. 69.
(6) L. R. 3 Q. B. 521.
(7) [1902] 2 Ch. 145.
(8) Willes, 623, 628.
(9) (1862) 1 H. & C. 102.
(10) [1902] 2 Ch. 161.
(11) 3 B. & Al. 366.
(12) (1745) 1 Wils. 107.
(13) (1777) 2 W. Bl. 1116.

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buyers can ascertain what they have to pay. There is no authority for that proposition, but it has never been questioned. All tolls are not customary; for instance, turnpike tolls are fixed by statute and the list of tolls is to be accessible to the public. The clerk of the market ought to have published them at the time when markets were commencing and people could not read or write: Co. 2nd Inst., p. 219. Horner has no right to take tolls from the sellers. He might arrange to do so by individual contracts, but there is no trace of anything of that kind.

Upjohn, K.C., Gore-Browne, K.C., and *S. R. Earle*, for Horner. There is no evidence that anybody has found a difficulty in ascertaining the particulars of the tolls. On the question of taking tolls from sellers we point out that that question has never been in issue in any of the authorities. It was treated as an open question in *Hill* v. *Smith*. (1) There is no authority either way, and it is obviously more convenient to take them from the sellers. Long usage shews that in this case Horner was right in doing so. By long practice the custom has grown up that for the convenience of the public tolls are taken from the sellers, and they get them back from the buyers by charging increased prices. That is a reasonable custom and will be supported. Probably in this case there was an old charter with the particular practice that tolls should be taken from sellers, and that charter was regranted by Charles II. with all its former incidents. The common law grows and it is now legal to collect tolls from sellers. The existence of a right of this sort can be presumed: *Penryn Corporation* v. *Best*. (2) That the market is now used as a wholesale market is not due to Horner's action, but to that of the sellers. It is impossible to say what tolls will have to be paid in all cases, and the owner is entitled to discriminate between individuals. The language of the charter is quite general, and the evidence shews that taking tolls from buyers would destroy the franchise. It was to avoid frightening away the buyers that a list of tolls was not put up. This Court is not bound by dicta, and there is nothing to shew that the suggested rule that tolls must be taken from buyers has ever been acted on.

(1) (1812) 4 Taunt. 520. (2) 3 Ex. D. 292.

[COZENS-HARDY M.R. The rule has been unquestioned law since the time of Henry VI. and it would be wrong of us to throw any doubt upon it.]

The Court will consider what is reasonable in the circumstances and will presume a lawful origin for these tolls: *Lawrence* v. *Hitch.* (1) They might well have been granted by charter. Anterior usage will be presumed from the proved length of usage, and that, coupled with the general terms of the charter, establishes our right: *Chad* v. *Tilsed.* (2) That lets in the doctrine "Contemporanea expositio est fortissima in lege": Norton on Deeds, pp. 141, 142; *Attorney-General* v. *Drummond.* (3) There is no authority for the proposition that tolls must be taken from the buyers if there is not an express provision to the contrary. It is admitted that unless the ancient usage is maintained the franchise will be destroyed. We ask the Court to presume that before the time of legal memory the Crown granted a charter which gave us the right to take tolls from sellers; that that charter was forfeited or surrendered and again granted to us: *Abbot of Strata Mercella* (4); *Macclesfield Corporation* v. *Pedley* (5); *Penryn Corporation* v. *Best.* (6) By the usage in this case it has been settled that the tolls payable by the buyers shall, for the sake of convenience, be paid by the sellers; and that is reasonable.

[COZENS-HARDY M.R. You need not argue the point that these tolls are reasonable; and the absence of notice of the amount is immaterial.]

Tolls not fixed by charter may be varied from time to time and need not be uniform: *Lawrence* v. *Hitch.* (1) If the maximum is reasonable it is lawful to make a smaller charge to individuals: *Duke of Bedford* v. *Emmett.* (7) All the witnesses have deposed that they were perfectly satisfied with the treatment they have received from Horner.

Cave, K.C., in reply.

Cur. adv. vult.

(1) L. R. 3 Q. B. 521.
(2) (1821) 2 Brod. & B. 403.
(3) (1842) 1 D. & War. 353.
(4) (1591) 9 Rep. 24a, 25b.
(5) (1833) 4 B. & Ad. 397.
(6) 3 Ex. D. 292.
(7) 3 B. & Al. 366.

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April 14. The following written judgments were delivered :—

COZENS-HARDY M.R. Although the arguments before us on the defendant's appeal occupied eleven days, I do not think there is any serious dispute as to facts, or that there are many questions of law which arise for our determination. The appeal relates to Spitalfields Market, a market which has been dealt with twice by the House of Lords. It is an action by the Attorney-General, claiming (inter alia) that the defendant Horner is exercising market rights on days not authorized by the charter, and claiming an injunction restraining him from so doing, and also a declaration that, except on market days, he is not entitled to cause any obstruction in the adjoining streets, and for consequential relief. I will endeavour to state, as concisely as possible, the facts which I think are admitted or proved, indicating those as to which there may be a question. [His Lordship stated the facts as set out above, and continued :] On the present appeal, Horner, who is unable in this Court to claim a franchise for six days, raises a contention which is undoubtedly ingenious and worthy of consideration. He says: "Admitting that I have no franchise except on Thursday and Saturday, and no right to tolls except on those two days, the evidence shews that beyond living memory I have carried on what I call a private market, and in respect of that private market I assert that I have a right to overflow into the adjoining streets on Monday, Tuesday, Wednesday and Friday to the same extent as it is not now disputed I have in respect of franchise rights on Thursday and Saturday." It is argued that every possible presumption ought to be made to find a legal origin, and that it can be found by presuming that, in so far as the streets were part of the market square estate, they were dedicated to the public subject to such a reservation in favour of the market owner, and in so far as the streets or other property on which rights have been exercised do not and did not belong to the market owner, an easement ought to be presumed sufficient to justify, not merely the market owner, but also all persons invited by, or licensed by, him to overflow. Now I confess myself entirely unable to understand what is meant by "private market." I cannot find a trace of any act done in

these streets except under a claim of the exercise of franchise rights.

The right claimed is left in no doubt when we refer not only to the parol evidence and to the pleadings, but to the various particulars and conditions of sale in the first half of the nineteenth century. Take Monday and Wednesday. It is really too plain for argument that what was done in the streets in those days was in reliance upon the charter of James. And although there was in truth no charter of any kind including Friday, I think it is impossible to suggest that on Fridays as well as on other days the market owner was not in effect asserting that he had, and was not claiming tolls on the footing that he had, franchise rights.

I am not prepared to make a presumption not in accordance with rights claimed. Long user not explained may justify the Court, and, indeed, in some circumstances, may almost compel the Court, to presume what is necessary to give validity to the usage. When, however, the right claimed cannot be established on the ground claimed, an incidental portion of the right claimed cannot be established on the mere ground of long usage. In other words, a presumption to support a right claimed may be reasonable, but a presumption to support a mere fragment of a right claimed and never exercised apart from the right claimed is a wholly different proposition.

There is ample authority that long usage must be attributed to the right claimed. In *Campbell* v. *Wilson* (1) Lawrence J. says: "No doubt but that adverse enjoyment of a right of way for twenty years unexplained is evidence sufficient for the jury to found a presumption that it was a legal enjoyment; and such in effect was the opinion of the learned judge in his direction to them. But it has been said that if the enjoyment was shewn to have originated in mistake, however adverse it may have been, that is against the presumption, and that the learned judge misled the jury in this respect: but no facts appear to warrant this objection, otherwise it might be very material to be considered. For if in exercising the right of way from time to time it had appeared that the party had asserted his right to be

(1) (1803) 3 East, 294, 301.

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grounded on the award, though it were exercised ever so adversely, I do not know how the jury would be warranted in referring it to any other ground than what the party himself insisted on at the time." In *Lord Rivers* v. *Adams* (1) Kelly C.B. in delivering the judgment of the Court quoted Lawrence J.'s language with approval and added: "It is plain that if we refer the user to any other right than the one in respect of which it was actually exercised, we might be doing the greatest injustice." *Chamber Colliery Co.* v. *Hopwood* (2) is another instance in which this principle was recognized.

I do not think it necessary to go through the long series of cases which were brought to our notice as to the circumstances in which presumptions ought to be made. I agree that the presumption is often made, although, in truth, nobody believes that the lost grant was, in fact, executed. But it is a wholly different proposition to assert that the Court must disregard known facts, and must deliberately shut its eyes to everything except the usage for, say, twenty or thirty years. Assuming, as I do, that a lost grant from the Crown cannot be presumed in the present case so as to justify the exercise of market rights on six days of the week, it seems to me to follow that effect cannot be given to the argument pressed upon us on behalf of the appellant. The right to an overflow in respect of a "private market," which I take to be merely a name for a shop, or shops, is something so vague and uncertain that I cannot recognize it as a legal foundation.

I am not satisfied that there is a possibility in law of supporting the right. It may be that a man who intends to dedicate a highway may reserve the right to obstruct. This is certainly true as to physical obstruction, such as a stile or a gate, for the public must take the road in the condition in which they find it. But it is another question whether there can be a dedication subject to a right in the future to obstruct. The case of *Reg.* v. *Charlesworth* (3) throws grave doubt upon this proposition. With regard to the other point, namely, the alleged easement, it is a novelty. An easement, speaking generally,

(1) 3 Ex. D. 361, 372. (2) 32 Ch. D. 549.
(3) 16 Q. B. 1012.

must be for the benefit of the dominant tenement, the market square, and not for the benefit of the sellers coming to the market.

Great stress was laid in argument upon the absence of proceedings by the local authorities to restrain obstruction every day in the week. In the first place, it is not every slight obstruction which could be reasonably complained of. Within certain limits every shopkeeper has a right to have vehicles stop in the street opposite his door, and it is quite apparent that there has been within the last (say) thirty years a development of the market which I can fairly describe as enormous. I say this from the increase of tolls received by Horner, which have risen from 750*l.* a year to 25,000*l.* a year. Upon the whole, it seems to me that Warrington J. was right in the view which he took, and that Horner has no special and peculiar right to cause obstruction in the streets on Mondays, Tuesdays, Wednesdays, or Fridays.

Another point made by the appellant was this: Assume that what Horner has been doing on the four non-charter days is unauthorized and is a nuisance, still it is so greatly to the advantage of the public as a whole that the Court ought not to interfere. I fail to appreciate this argument. It is for the Attorney-General, as representing the public, or one section of the public, to consider whether the case is one for his interference. If he decides to interfere it is impossible for the Court to say, "Oh, the Attorney-General ought not to ask us to interfere, because there is another and more numerous section of the public who will be benefited by the continuance of the illegal acts." On this point also I think Warrington J. was perfectly right.

Warrington J. has by the order under appeal granted an injunction declaring that the holding by Horner of a market on days other than Thursday and Saturday is unlawful, and that he is not entitled to use the internal and external streets for the purpose of a market on any day other than Thursday and Saturday, and has granted an injunction restraining such user of the streets, and has given liberty to apply for an injunction if the market is continued by Horner except on Thursday and

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Saturday. In my opinion his judgment on this part of the case was correct, and the defendant's appeal must be dismissed with costs.

There is a cross-notice by the plaintiff, and this raises different points. The defendant has throughout this litigation, and for many years, claimed the right to take tolls from the sellers of goods brought to market, and has in fact levied such tolls to a very large amount. This practice has existed as long as living memory extends, and indeed I think I am right in saying that there is no evidence of any toll being either claimed or levied from a buyer. The contention of the Attorney-General is that under a modern charter tolls can only be recovered from the buyer, and he asks for a declaration to that effect with consequential relief. The learned judge accepted that view of the law, but he declined to make any declaration, and dismissed with costs the action so far as it related to that relief. With great respect I am unable to follow the reasoning of the learned judge in this respect. If his view of the law is correct, it seems to me that effect ought to be given to it by a declaration, and that it cannot be right to dismiss with costs an action seeking such a declaration. It remains, however, to consider whether the learned judge's view of the law is correct. He says: "The general rule of law is, I think, that toll is payable by the buyer, and not by the seller. The general rule may be excluded by custom, or by prescription, but this is a modern market, a fact in my opinion fatal to a claim for tolls founded on custom or prescription." I entirely agree with that statement of the law. We were invited by counsel to hold that the law was otherwise. It certainly was so laid down in the reign of Henry VI. It was repeated by Lord Coke, and by many of the greatest lawyers who in modern times have considered the point, such as Bayley J. and Holroyd J. in the Covent Garden Market case, *Duke of Bedford* v. *Emmett*. (1) I asked counsel whether there was any decision to the contrary, or even any dictum, either in judicial proceedings or by text-writers, throwing doubt upon the proposition. Counsel was obliged to answer my question in the negative. This being so, I think it is idle to ask us to unsettle the common law on a point like this. It was, however, contended

(1) 3 B. & Al. 306.

by counsel that in order to support this usage to exact tolls from sellers we ought to presume the grant by the Crown of a franchise prior to the reign of Richard I., under which a right to levy tolls from the seller was given, and that that franchise was forfeited, or in some other way became vested in the Crown, and was granted under the general words by King Charles II. in 1682. This argument has the merit of ingenuity, but that is all I can say for it. It is abundantly plain that there was no market prior to 1682 on this spot. The presumption of a lost Crown grant cannot possibly be made. The difficulty of such a presumption is infinitely greater than that which this Court declined to make in 1884.

It may be true that to accept tolls from buyers is extremely inconvenient and indeed highly prejudicial to the franchise owner. The changes which have come to pass in the course of centuries may be a ground for applying to Parliament to confer a right to charge tolls upon the seller, and not upon the buyer, as was done by the Duke of Bedford with reference to Covent Garden Market. These considerations may have weight before a parliamentary committee, but they cannot be allowed to influence our judgment as to the legal operation and effect of the charter of Charles II. I think, therefore, that the cross-appeal on this point succeeds. The declaration asked for must be made, and an injunction granted on the footing of the declaration. In what I have said about the illegality of charging tolls against the seller I, of course, am not alluding to tolls in the nature of piccage and stallage.

I ought to say that the learned judge felt himself justified in negativing the declaration, because there was evidence that the sellers, according to the custom of the market, paid the toll for and in lieu of the buyer. That, however, does not in any way prevent the act of Horner from being illegal. Any individual seller may contract with Horner that his, the seller's, goods shall be sold in the market, toll free, in consideration of an agreement by the seller to pay a sum equal in amount to the tolls properly payable by the buyer. This, however, must be an individual contract by each seller, and is absolutely inconsistent with the claim made against the seller direct for tolls.

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There are other points of minor importance raised by the cross-appeal. It is alleged that the tolls are unreasonable in amount, or, to use the old form of language, "unreasonable, rank and outrageous." I think there is no evidence to support this suggestion. No particular toll has been proved to be excessive. No doubt it is proved that some tolls have been raised to an amount beyond what was formerly paid. In my opinion that circumstance proves nothing. Tolls may be varied from time to time, and the fact that they are so varied is not evidence that they are unreasonable. It is also complained that the amount of tolls charged is not in any way published, or capable of being ascertained, and that it rests with Horner to say what tolls he thinks fit to charge. I confess I have a good deal of sympathy with this suggestion, but I cannot find anything to support the view that there is any obligation upon a franchise owner to make known the charges which will be levied at any particular date upon each particular article. Other points of still less importance were raised to which I do not think it necessary to refer.

It might be sufficient to say that, as in my view no tolls have been levied by Horner upon the persons who alone are liable to pay tolls, the question of unreasonableness does not really arise for our decision.

The result is that, in my opinion, the cross-appeal must be allowed to the extent indicated; that is to say, that part of the judgment which dismisses the action, so far as regards the claim for a declaration that the defendant is not entitled to levy tolls from sellers or intending sellers, must be discharged, and a declaration made to that effect; and an injunction must be granted to restrain the defendant from demanding any such illegal tolls. The costs paid by the Attorney-General must be returned, and the Attorney-General must have the costs of that part in the Court below and in this Court. But there should be no costs either in the Court below or in this Court of that part of the action which relates to the tolls being unreasonable.

BUCKLEY L.J. In *Great Eastern Ry. Co.* v. *Goldsmid* (1) it was decided that, notwithstanding the statute charter of

(1) 25 Ch. D. 511; 9 App. Cas. 927.

Edward III., the charter of Charles II. of 1682 was valid, and that the charter of James II. was annulled by the Act of William and Mary. The Court declared that the plaintiffs were under the charter of Charles II. entitled to markets on Thursdays and Saturdays and granted an injunction to restrain the Great Eastern Railway Company from disturbing that market. In those proceedings user of the market was proved from 1723.

In *Attorney-General* v. *Horner* (1) two things were decided in the Court of Appeal—(1.) that the franchise market was without metes and bounds and might extend over the surrounding streets and that they must be presumed to have been dedicated to the public subject to the exercise of the market franchise; and (2.) that although the market had been carried on for six days in the week a lost charter or grant for the four days other than Thursday and Saturday was not to be presumed. In that action complaint was made of tolls improperly taken and obstruction to the highway of the surrounding streets occasioned on every weekday. Evidence was given that by long usage the market days were Tuesday, Thursday, and Saturday, but that sales were made and tolls taken on the other days. Stephen J. granted an injunction. The Court of Appeal discharged it, and having regard to the declaration already made in *Great Eastern Ry. Co.* v. *Goldsmid* (2) simply gave judgment for the defendant. At the conclusion of the judgments Cotton L.J. pointed out that what the Attorney-General asked was simply to restrain the defendant as regards user of the inner and outer streets and that "there was no mention made about days at all." The Attorney-General appealed. The House of Lords affirmed the decision without calling upon the respondent's counsel. In the House of Lords the question of lost charter or lost grant was not raised. The right of user of the streets was alone argued, and although at the conclusion of his argument the Attorney-General asked for an injunction confined to the days other than Thursday and Saturday, Lord Selborne pointed out that no distinction was made in the statement of claim as to any particular days in the week, and the House declined to go into that. Both in the

(1) 14 Q. B. D. 245; 11 App. Cas. 66.

(2) 25 Ch. D. 511; 9 App. Cas. 927.

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Court of Appeal and the House of Lords the question decided as to right of overflow was geographical only, and did not extend to any discrimination in respect of different days of the week.

That case of *Attorney-General* v. *Horner* (1) plainly decided that a lost charter or lost grant for a market on the four days is not to be presumed. In this Court that decision cannot be reviewed, and although Mr. Upjohn opened, as his first contention, that we ought to presume a lost charter, we have declined to hear argument upon the point. That matter is, at any rate, so far as we are concerned, concluded against him.

His next contention was that if no presumption is to be made of a lost charter, yet in fact upon the evidence a market has for a time extending beyond living memory been held on six days in the week, and has on the four days not included in the charter overflowed into the adjoining highways: that a user by way of overflow on non-charter days is thus established as a fact, and that a legal origin for it ought to be presumed. The user of the adjoining streets by way of overflow of that market which was held de facto on the four days has, he argues, continued so long that either (1.) a presumption should be made that that user preceded the dedication of the streets as highways, and that, if the soil of the highways belonged to the owner of the market estate, the streets were dedicated subject thereto, or (2.), if the soil of the highways belonged to others, there should be presumed a lost grant in favour of the owner of the market estate executed before the streets were dedicated to the public.

Upon the question of presumption made to support a legal right which has been long enjoyed, a vast number of authorities have been cited to us from *Bedle* v. *Beard* (2) onwards. I take the law to be as follows: Where possession or user in assertion of a right capable of a legal origin has been long enjoyed, although not from time immemorial, and is unexplained, the Court will presume a legal origin if a legal origin be possible, and for that purpose will presume such acts or grants as are necessary to create a legal title. This may be so even if there

(1) 14 Q. B. D. 245; 11 App. Cas. 66.
(2) 12 Rep. 5.

be an original infirmity in the de facto commencement: *Halliday* v. *Philipps*. (1)

If long user as of right unexplained be proved, the presumption arises without further evidence. It then arises not upon evidence, but for default of evidence. It may be displaced by evidence, but requires no further evidence for its support: "Where there has been long-continued modern user of a right capable of a legal origin, the existence of that legal origin should be presumed, unless the contrary be proved": Blackburn J., *Shephard* v. *Payne*. (2) If there be evidence to the contrary the question is for the jury: *Griffith* v. *Matthews*. (3) Further, if the facts are such as that a presumption ought to be made, the Court, as Lord Kenyon once said, will presume not one but one hundred grants if necessary: see *Roe* v. *Ireland*. (4) Willes J. in *Rogers* v. *Brooks* (5) said, referring to a possession of only thirty-six years, that after so long a possession he would presume anything in favour of the plaintiff. This is quoted with some reserve by Lord Herschell in *Halliday* v. *Philipps*. (6) Further: "It is, because there are no means of creating belief or disbelief, that such general presumptions are raised. . . . . Where the circumstances are incapable of forming anything like belief, the legal presumption holds the place of particular and individual belief": Lord Erskine in *Hillary* v. *Walker*. (7) It is not that the Court really thinks a grant has been made, but it presumes the fact from a principle of quieting the possession: *Eldridge* v. *Knott*, by Lord Mansfield. (8) The Courts are not merely entitled, but are "under an obligation which has been insisted upon over and over again, wherever they can, to clothe with legal right long-continued and undisputed enjoyment": Fry L.J. in *Halliday* v. *Philipps*. (9) The result is not only to justify but almost to compel the Court to make the presumption. If, however, it be shewn that the right was originally invalidly acquired, and the enjoyment is consistent rather with that right than with its having been made a legal right, the presumption is not justifiable:

(1) 23 Q. B. D. 48; [1891] A. C. 228.
(2) (1864) 16 C. B. (N.S.) 132, 135.
(3) 5 T. R. 296.
(4) 11 East, 280, 284.
(5) (1783) 1 T. R. 431, n.
(6) [1891] A. C. 234.
(7) 12 Ves. 239, 266.
(8) 1 Cowp. 214.
(9) 23 Q. B. D. 56.

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Halliday v. *Philipps*. (1) Or if the enjoyment have been under a supposed right which did not, or possibly did not, exist, as, for instance, by lessees upon the assumption that it was authorized by their lease, it has not been an enjoyment as of right adversely to the lessor so as to call the doctrine into play: *Chamber Colliery Co.* v. *Hopwood*. (2) Presumption only arises where the enjoyment cannot be otherwise reasonably accounted for (*Gardner* v. *Hodgson's Kingston Brewery Co.* (3)), where the enjoyment cannot be otherwise explained (*Attorney-General* v. *Simpson* (4); *Attorney-General* v. *Antrobus*. (5)) If the enjoyment is equally consistent with two reasonable inferences, enjoyment as of right is not established: *Gardner* v. *Hodgson's Kingston Brewery Co.* (6)

These being the principles of law, I come to see what are the facts of the present case. The short facts relevant to this part of the case are as follows. By the charter of 1682 a franchise was granted for Thursdays and Saturdays; by the charter of 1688 a franchise was granted for Mondays, Wednesdays, and Saturdays by way of substitution for Thursdays and Saturdays; in 1742 Moore, by his petition, asked for a franchise for Tuesday and Thursday, and for a confirmation of the market upon Monday, Wednesday, and Saturday, but he did not succeed in obtaining a charter. It was not until the year 1884 that it was decided that the charter of James II. for Mondays, Wednesdays, and Saturdays was invalid. So long as living memory extends the market has been held upon six days in the week, and the overflow of the market into the streets has extended to each of those days.

As matter of decision, it is now established that there is a franchise of a market without metes and bounds, but not for any days other than Thursdays and Saturdays. The appellant contends, and rightly, that on the other four days of the week it was competent to him to allow sellers and buyers to come upon his ground to traffic, and that in that sense the owner of the land could hold upon those four days that which the appellant has

(1) [1891] A. C. 236.
(2) 32 Ch. D. 549, 557.
(3) [1903] A. C. 229, 240.
(4) [1901] 2 Ch. 671, 698.
(5) [1905] 2 Ch. 188, 199.
(6) [1903] A. C. 229.

called a private market, or proprietary market, or de facto market. This no doubt is so. But it is not a market in the legal sense on those days; he has on those days no right to charge tolls in the streets, but he has throughout claimed, and in these proceedings claims, the right to do so. By so doing he has been preferring a right to occupy the streets in a character in which he was entitled to charge tolls in the streets. This was an assertion of a right to a market franchise on those four days, and to an enjoyment of overflow in connection with that franchise. That right he did not possess. It has been found as a fact that the defendant claimed to be entitled to do what he did by virtue of his franchise. The claim which he was preferring as of right, therefore, was a claim based upon a right which did not exist, and I see no ground upon which the Court can be asked to presume a legal origin for a right which is shewn throughout to have been not a right, but a wrong. A man cannot prescribe contrary to, or in manner inconsistent with, the title which he produces, and on which he relies: *Labrador Co.* v. *Reg.* (1) If his enjoyment originated in mistake and he asserted his right to be grounded, say, on an award which did not support it, then however adversely the right may have been exercised, it cannot for purposes of presumption be referred to any other ground than what he himself insisted on at the time: *Campbell* v. *Wilson.* (2) The passage quoted in the judgment in *Lord Rivers* v. *Adams* (3) from the judgment of Lawrence J. in *Campbell* v. *Wilson* (4) is, I think, directly in point. It is as follows: "For if in exercising the right of way from time to time it had appeared that the party had asserted his right to be grounded on the award, though it were exercised ever so adversely, I do not know how the jury would be warranted in referring it to any other ground than what the party himself insisted on at the time." Further, I am unable to agree that such a right as is claimed is legally possible of enjoyment as appurtenant to the market estate. The market owner carried on upon the market estate that which upon non-charter days was simply his private business. An enjoyment of the

(1) [1893] A. C. 104, 107, 122.
(2) 3 East, 294.
(3) 3 Ex. D. 361, 371, 372.
(4) 3 East, 302.

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right of overflow upon the adjoining land would or might tend to increase the profits of his business, and, if such an expression may be allowed, may have been incident to his business, but it cannot have been appurtenant to his land. A partial dedication is no doubt possible in law: *Marquis of Stafford* v. *Coyney*. (1) Thus dedication may be made subject to certain reservations, such as a reservation of the right of the owner of the soil periodically to plough the land over which the way passes (*Mercer* v. *Woodgate* (2); *Arnold* v. *Blaker* (3)), or a reservation of a right in the owner of the soil to use the soil as a towing path (*Grand Junction Canal Co.* v. *Petty*. (4)) But the owner cannot dedicate a highway subject to the right to commit a nuisance on the highway by obstruction (*Reg.* v. *Charlesworth* (5)), or subject to a right to take tolls (*Austerberry* v. *Oldham Corporation*. (6))

The right, therefore, is, I think, incapable of being supported by a presumption of a dedication by the defendant's predecessor in title as owner of the soil subject to a reservation in his favour of the rights claimed over the adjoining streets on the four de facto market days. Further, if the soil of the adjoining streets was not the land of the market owner but of another, there cannot, I think, in law exist in a person a legal right by prescription to authorize members of the public to occupy the land of another person by standing carts and so on upon it, and to claim payment for allowing them to stand there and to make such right appurtenant to the adjoining land of the market owner. Such a right would be a right connected not with the land, but with the business carried on upon the land of the market owner, and the right claimed would be merely a licence not transferring any property, but making lawful an entry and user which would otherwise be unlawful: *Ackroyd* v. *Smith* (7); *Bailey* v. *Stephens*. (8) The impossibility of such a supposed lost grant as is suggested becomes apparent directly one attempts to express in language the provisions of the supposed deed by which such a grant appurtenant to the estate of the market owner could be granted.

(1) (1827) 7 B. & C. 257.
(2) L. R. 5 Q. B. 26.
(3) L. R. 6 Q. B. 433.
(4) 21 Q. B. D. 273.
(5) 16 Q. B. 1020.
(6) (1885) 29 Ch. D. 750.
(7) 10 C. B. 164.
(8) 12 C. B. (N.S.) 91.

I may add that the decision upon this second contention of the appellant is, in my judgment, not expressly but by implication governed by the previous decision in *Attorney-General* v. *Horner*. (1) The right of overflow can only be and has only been claimed as a right enjoyed with the market and with the incidents of the market, by which I mean the demand of tolls and the occupation of the streets for the purposes of the market and during market hours. If, as has been decided, there is no legal market authorized by charter, this right cannot exist as a legal incident of that market. This right must stand or fall with the market of which it is an incident, and if a lost charter to authorize the market is not to be presumed, then neither can a lost charter, or grant, or prescriptive title to the right of overflow be presumed. The defendant's second contention, in my judgment, therefore fails.

But assuming, as I have held, that the defendant is wrong in both the above contentions, he argues that still an injunction ought not to be granted. The public, he says, have two rights and interests, the one to enjoy the highways unobstructed, the other to have the benefit of his de facto market; the latter advantage he says exceeds the former, and the public ought to be left in enjoyment of the benefit of the market. The answer to the above, I think, is twofold. If the public have two such rights, and they by the Attorney-General sue to enforce one of them, it is not for the Court to say that they ought to have selected the other. The Court cannot refuse to enforce one right because the plaintiff had another which he might have put forward. Moreover, in the second place, the public have no rights in respect of the market on the four non-charter days. The owner of the market might cease at his own will to maintain that market, and the public would have no redress. In my opinion the injunction was rightly granted.

The cross-appeal is by the plaintiff against paragraph 5 of the order made by the learned judge. The first question upon it is whether, as the learned judge held, the tolls in this market are properly payable by the buyer, and not by the seller. Upon this question we have been referred to authorities

(1) 14 Q. B. D. 245; 11 App. Cas. 66.

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beginning with the Year Book of the ninth year of Henry VI. down to *Duke of Bedford* v. *Emmett* (1), which are all one way, against which not a single authority or dictum has been cited by the defendant, and which state plainly that, except in a market in which custom and prescription can be set up, market tolls are at common law due from the buyer and not the seller. If the defendant desires to challenge such a concurrence of authority he must do so, not in this Court, but in the House of Lords. In my judgment the learned judge was right in holding that the defendant was not entitled to demand, as he has demanded as matter of right, tolls from the sellers. A contention was put forward to the effect that, assuming the law to be as I have stated, it would nevertheless be competent for the market owner to agree with the seller that the seller should, on behalf of and to the indemnity of the buyer, pay the toll demandable from the buyer. This may very well be so. But, in the first place, there is no evidence whatever that that was what took place. The tolls were demanded from the seller as matter of right under the franchise; there is no trace of any contractual arrangement such as I have mentioned. Moreover, such a contract by the seller to pay the like sum to that which might have been demanded from the buyer would be a demand not of a toll but of a contractual sum equal to the toll. That is not the right which the defendant has set up. He claims (see, for instance, paragraphs 8, 8 (A), and 8 (B) of the defence) to take from the sellers the payments which he has taken as being tolls. It follows that, in my judgment, the plaintiff is entitled to a declaration that the defendant is not entitled to take tolls from the sellers or intending sellers of goods, and that he is entitled to the costs of the action so far as that matter is concerned. He is also, I think, entitled to an injunction. The defendant has claimed, as of right, payments to which he is not entitled, and has by his defence, and before us, contended that he is entitled to take them. There must, I think, be a declaration to the effect which I have stated, an injunction pursuant to that declaration, and an order as to costs. I am unable to follow the reasoning by which the learned judge arrived at the decision that while

(1) 3 B. & Al. 366.

deciding that the plaintiff was right upon this question he could, as he did, dismiss the action in respect of it.

The next matter which arises upon the cross-appeal is upon paragraphs 3, 4, and 5 of the claim. The question here is whether the tolls which the defendant has demanded have been unreasonable, rank, and outrageous. My first observation upon this is that when 2 (A) was introduced into the claim by amendment, paragraphs 3, 4, and 5 became superfluous except in the event of the plaintiff failing in respect of 2 (A). They should then have been expressed as alternative claims. If the defendant is not entitled to charge at all the tolls which he has charged, namely, tolls from the sellers, it is immaterial whether they were unreasonable, rank, and outrageous. This question, therefore, does not arise if, as I think, the plaintiff is entitled to the declaration asked by the first part of 2 (A). I may add, however, that the onus of proving that the tolls were unreasonable lay upon the plaintiff, and that he has, in my judgment, not adduced evidence to shew that that is the fact. As regards paragraphs 3, 4, and 5, therefore, I think that the action was rightly dismissed.

The result, therefore, is that the appeal should be dismissed with costs, and that on the cross-appeal there should be a declaration that the defendant is not entitled to take tolls from sellers or intending sellers, and an injunction to restrain him from so doing, and that the order below be varied accordingly. As regards the costs, I agree with what the Master of the Rolls has said.

HAMILTON L.J. I think this appeal fails on all points. The claim to a lost charter for Mondays, Tuesdays, Wednesdays, and Fridays is concluded for us by the decision of this Court in *Attorney-General* v. *Horner*. (1) The House of Lords, too, though deciding on other grounds (2), assumed that there was no charter but that of 1682, and that with it the Spitalfields Market, in fact, originated. Lord Blackburn says (3) that an immemorial origin for it would be "absurd," and the Court of Appeal considered the

(1) 14 Q. B. D. 245. (2) 11 App. Cas. 66.
(3) 11 App. Cas. 83.

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origin of the market to be so fully proved that no question of presumption arose. If this was so on the information then before this Court, how much more must it be so now on our present information? Similar reasoning must be fatal to any presumption in favour of this market alternative to that of a lost charter. In *Duke of Newcastle* v. *Worksop Urban Council* (1) a presumption similar to that of a lost charter to be made under circumstances fully known was suggested in argument, but Farwell J. made no such presumption, and this was not appealed against.

Still, we have been strongly urged to isolate the user proved for Mondays, Tuesdays, Wednesdays, and Fridays from that proved for the other two days, to refer it to an actual independent origin at some suitable date, and to support it by the presumption of some sufficient legal authority. Before us the contention has necessarily been that this authority may be other than a royal franchise. Why the appellant should care to assemble buyers and sellers in the streets who, not being on his land, will pay him no stallage, and not assembling on his charter days will pay him no toll, I cannot understand. I should have thought that in this way he would teach them that Friday is as good a day as Saturday, and better, too, because cheaper. However, I suppose he knows his own business best.

The point was not pleaded either in the previous or in the present action. It was taken before Warrington J., but only after all the evidence was out. Following the practice desiderated in *Simpson* v. *Godmanchester Corporation* (2) and prescribed in *Hyams* v. *Stuart King* (3), we required the defence to be amended formally. Though the amendments include almost every other possible way of putting the appellant's case, they do not, in my construction of them, include that suggestion of a compact among all parties owning the soil of the outer streets to dedicate it jointly in furtherance of an assumed common interest in the charter of 1682 which Lord Selborne relied on in the previous action. Paragraphs 20 and 22 are too vague for this. Still, the amendment was worth making, for, if it does not set metes and bounds

(1) [1902] 2 Ch. 145, 149. (2) [1897] A. C. 696, 706.
(3) [1908] 2 K. B. 696, 700.

to the appellant's argument, it at least serves to confine it "in sive juxta" the area of rational discussion.

What has he proved? A user by way of "overflow" in all the streets, though slighter in some than in others; a user for all weekdays, though greater on some days than on others. I will assume that he has proved this user as of right, though ever since the decision in *Great Eastern Ry. Co.* v. *Goldsmid* (1) he has acted in purported reliance on the charter but in plain disregard of the authoritative declaration then made as to its extent, and therefore ought not to rely on what he has done since that decision to prove a legal origin independent of the charter.

Now, the basis of the presumption is the proved usage. The appellant must take all its essential features and postulate their existence at least at the time of the presumed legal origin. He cannot select those that suit his case and reject the rest. "The question in this case," says Lord Selborne in *Goodman* v. *Saltash Corporation* (2), "being altogether one as to the true nature, character, and conditions of a prescriptive title, established by evidence of user and enjoyment only, the whole user which has prevailed from time immemorial until now, and not only that part of it which is in favour of the respondents, may be, and ought to be, taken into account." It is from the usage proved that the appellant has to reconstruct the origin of the usage in fact: it is to that usage that he must fit his presumed origin in law.

What are those essential features? First, all that has ever been done has been done under colour of an existing franchise. Every day of the week and everywhere in the market area, in sive juxta, market tolls on goods for sale have been taken as under a franchise. Second, from 1682 to 1912 no one ever alleged, or apparently ever conceived, any basis for what was being done except the charters of Charles II. and James II. All the leases and conveyances and conditions of sale relied on actual charters and on nothing else. Once, and only once, has dedication been relied on, and that was when, in *Attorney-General* v. *Horner* (3), the House of Lords, following the suggestion made at the end of paragraph 10 of the defence, presumed that, in a

(1) 25 Ch. D. 511; 9 App. Cas. 927.
(2) 7 App. Cas. 633, 647.
(3) 11 App. Cas. 66.

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dedication ancillary to and for the purposes of the charter of 1682, the user of the outer streets in connection with the Thursday and Saturday markets might have its origin.

How then can any usage now be referred to some state of facts and to some right independent of the existing charter? The appellant suggests that his predecessors, though exercising their franchise rights on Thursdays and Saturdays, on other weekdays carried on a private sale yard or costermongers' exchange on their "market estate" by right of ownership, and that the business throve so mightily that for want of room the customers had to overflow its boundaries and traffic on the surrounding land, where now the outer streets are.

There is an odd duality about these businesses to begin with, a two-day market and a four-day emporium. The singularity is greater still when one reflects that the characteristics of the present have to be projected into the past. This emporium must have been a wholesale one only. During living memory it has not been a place of retail trade. It was a vegetable and fruit emporium. During living memory other commodities have gone elsewhere—meat to Smithfield, fish to Billingsgate, hay to Whitechapel, and so on. The appellant cannot safely say that it is an instance of evolution, say, from a two-day to a six-day business, or from a retail to a wholesale one. That would be a rationalistic interpretation, an appeal to historical probability, leading to the conclusion that the whole user may be a usurpation upon or a misunderstanding of the charter of Charles II. A market expanding, rightly or wrongly, from two days to six, and from an area "in" to an area "juxta," as time goes on and business increases, is the respondent's case, and not the appellant's.

Again, this "overflow," the market estate having no more room, has to be applied to an estate of two and a half acres. Imagine a business before the Revolution, which the area of the Spital Square (formerly "Lollesworth" field—see document 53, indenture of May 10, 1682) could not contain! Why, down to Mr. Horner's own time, many scores of permanent buildings, not used for market purposes, were standing on the market area, and still there was generally room for the traders. Had it been otherwise, the franchise-holders ran the risk of a scire facias to

recall their grant for suffering obstructions upon the chartered area, which prevented buyers and sellers from finding accommodation there: *In re Islington Market Bill.* (1) Further, this usage of "overflow" prevails in all the outer streets, so far as they are adjacent to the market estate. It is a greater overflow in some parts than in others, but the user is claimed for all. Now, this extends to 1300 feet of frontage, which, at an average street width of only 15 feet, increases the market area de facto by overflow to about 17½ per cent. in excess of the market estate proper; certainly a surprising state of things to be entirely unknown to history.

One asks its date. It must have been prior to the dedication of the outer streets, that is, certainly before the first Paving Act, 12 Geo. 3, probably before the end of the seventeenth century. It would be contrary to the whole theory of dedications inferred from public enjoyment that the dedicator should be supposed to have reserved to himself at the time of the dedication, or to have granted to another before it, the right to do after dedication acts never done theretofore, so as thereby to cause a nuisance upon the highway, if and when it should be convenient: *Reg.* v. *Charlesworth.* (2) Commercial Street was widened about 1856 on the side away from the market estate. Of this added part there can in any case be no presumed original dedication. One asks what were the conditions, social, economic, and political, which, certainly 150 years ago and probably before the Revocation of the Edict of Nantes, made such a state of things possible? Where dwelt the multitude of consumers that gave employment to this busy hive of middlemen? Whence came the wares in which they trafficked wholesale in the days of the packhorse and the wain, and before the era of steam or even of inland navigation? What motive kept all hints of this state of things off the title? How came the jurors upon the inquisition possibly of 1682, and certainly of 1742, to close their eyes or, at any rate, their mouths to it? Why was it not pleaded or relied on in *Attorney-General* v. *Horner*? (3) Why was it not pleaded in *Attorney-General* v. *Horner* (*No.* 2)?

(1) (1835) 3 Cl. & F. 513. (2) 16 Q. B. 1012, 1020.
(3) 14 Q. B. D. 245.

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There are two ways of answering these questions. One is the respondent's way. He says that the whole explanation of the modern usage is plain and simple. Mr. Horner's predecessors have simply been doing during living memory what Mr. Horner himself has been doing since 1883, that is, exercising market rights de facto though he does not possess them de jure, because no one has said him nay. To do him justice, Mr. Horner has been open enough in the matter. Ever since the decision in *Great Eastern Ry. Co.* v. *Goldsmid* (1) it has been known that the charter for Spital Market is one for Thursdays and Saturdays only, but, undeterred by that, Mr. Horner has taken tolls as of his alleged charter right on the other weekdays just the same. I do not blame him. He was not doing anybody any harm. That few, if any, legal proceedings were taken to stop him is very natural. His arguable claim of right made resort to the summary jurisdiction of justices almost useless. The obstruction, after all, was mainly in the early morning hours, and often inconsiderable. It was not easy to say when it was in excess of that which is legitimately caused by carts loading and unloading at premises in the streets. He, at any rate, did not personally "pitch" vegetables on the pavements. Though his customers grumbled at his rents and tolls, they were on his side when it came to fostering and expanding the trade. As for the Attorneys-General, they probably had plenty of other things to think of. I agree with the explanation of the respondent. I think that the origin of the proved usage is not matter of speculation, but of proof. There is no need to resort to presumption. The hypothesis on which the appellant's presumption rests is most unreasonable, and is inconsistent with the whole of the evidence. Furthermore, the market holders have always stood upon their charters, and they must now take the consequences. It is so stated by Lawrence J. in *Campbell* v. *Wilson* (2) in the passage already read by the Master of the Rolls. Lord Blackburn approves this case in *Dalton* v. *Angus* (3), and in *Lord Rivers* v. *Adams* (4) the Exchequer Division adopts it. This is no question of estoppel. Part of the evidence of the user consists of the title asserted throughout by those who

(1) 9 App. Cas. 927.
(2) 3 East, 294.
(3) 6 App. Cas. 740, 813.
(4) 3 Ex. D. 361.

benefited by the user, and that part is enough to preclude any presumption. I no more believe in the seventeenth century emporium in this case than Kelly C.B. in *Lord Rivers' Case* (1) believed in the existence of the presumed grantee, which was there a corporation that clearly never existed.

The other way of answering the above questions is the appellant's, namely, to say that they are only asked from ignorance of the law. Having proved a sufficiently long user, he says that he may part company with fact and enter the realm of legal fiction. Isolating it from its context and thereby, as I think, misunderstanding it, he quotes Lord Selborne's statement in *Goodman* v. *Saltash Corporation* (2): "An open and uninterrupted enjoyment from time immemorial under a claim of right seems to me to be all that is necessary for a presumption that it had such an origin as would establish the right, if a lawful origin was reasonably possible in law." He claims that, if we accept the evidence of the user, it is an obligation juris et de jure to devise and presume a legal origin, any legal origin, to fit it. We are not called upon to furnish it with dates or other particulars; the law does not bind us to the fiction circumstantial; we are not called upon to believe what we say. We have to say it even in the teeth of our convictions, but unless we can see that no legal origin is possible in law, a legal origin for the user we must devise and adjudge.

I think this argument misconceived, and as it was urged on us with equal copiousness and learning, I will venture somewhat at large to say why I think so.

Presumption is the opposite of proof. It supplies the starting point for proof, and when complete proof fails, it may afford legitimate means of arriving at an affirmative legal conclusion. Where the truth of fact is known there is no need or room for presumption. Where evidence is forthcoming to the contrary, with rare exceptions not here material, presumptions are rebuttable, and must yield to proof. A question so raised is a question of fact and of probability depending on the circumstances: *Gray* v. *Bond.* (3) "We have to decide this, in fact, as jurymen," says Mellish L.J. in *Beckett* v. *Leeds Corporation.* (4)

(1) 3 Ex. D. 361.
(2) 7 App. Cas. 633, 639.
(3) (1821) 2 Brod. & B. 667, 671.
(4) (1872) L. R. 7 Ch. 421, 427.

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See, too, the passage cited by Buckley L.J. from *Hillary* v. *Walker*. (1)

The theory of a lost grant may be analysed into three elements. First, what is the character and what are the qualities of the usage or enjoyment proved? This is a question of fact. Second, what state of facts would afford a rational and reasonable origin for that usage or enjoyment? This also is a question of fact; and where it happens that the proof simply is that as things are so they always were, it is the same question of fact. The evidence on these questions, since they are questions of fact, must in principle always be rebuttable by counterproof. Third, in what legal form would that origin find appropriate expression? This is a question of law, and here, and, as I think, here only, we enter upon what is called legal fiction.

Why should this third question be asked at all? Because, if it were not, the Court might be giving validity to that which is essentially contrary to law, or uphold by its own prescription that which rests only on modern usage and has its origin within legal memory. "No length of enjoyment can establish a title which could have no legal origin; as, for instance, of an estate or interest which the law does not recognize": per Willes J. in *Johnson* v. *Barnes*. (2) These are things which only the Legislature can do. The lost grant is merely the legal garb with which the inferred legal origin is invested. Hence it is not properly a matter of belief. A jury, otherwise satisfied as to the inferences of fact, would not be allowed to defeat legal rights by untimely scrupulousness or scepticism about the reality of the missing grant. Often the grant never has any but a notional existence. As a thing of parchment and wax, it is often the shadow of a shade. The party who has proved his long unbroken enjoyment as of right, and has proved or may reasonably infer an actual and lawful state of things in which that enjoyment originated, is entitled to the exercise of all the Court's skill and knowledge in testing whether a legal form may not be found apt to cover that state of things. This is often called the "ingenuity" or the "astuteness" of the Court, I think very inappropriately. I prefer the description given by Lord

(1) 12 Ves. 266.

(2) (1872) L. R. 7 C. P. 592, 604.

Ashbourne in *Harris* v. *Earl of Chesterfield* (1) of the judgments in *Goodman* v. *Saltash Corporation* (2), which, be it said, was a case where the facts were all one way to prove immemorial enjoyment, and no fact needed to be assumed which was inconsistent with actual probability. He says: The Lords "applied their great powers to conceive a possible legal origin to support a long-continued user, and by a bold exercise of their vast resources they succeeded. . . . . It was a splendid effort of equitable imagination in furtherance of justice. The conception was reasonably possible and that sufficed."

Hence it is that, when once a state of things is established by proof and probable inference from proof, which constitutes a case of actual lawful origin, the presumption of some lost act or instrument validating it is not rebutted by objecting that so truly is it lost that no mention of it can be found. A lost fine and recovery have been presumed, though they ought to have been but were not on record in the Common Pleas: *Read* v. *Brookman*. (3) A lost enrolment has been presumed, though not on the manor rolls produced: *Haigh* v. *West*. (4) Whether the form ascribed to the origin must exclusively be a legal form or may be an equitable one is not settled: see *Dalton* v. *Angus* (5), per Bowen J., at p. 782; contra per Lord Blackburn, at p. 815. But apart from this, any legal form may be resorted to so long as it is effectual, a lost charter, a lost surrender, a lost deed creating a charitable trust, a grant whose possible date is narrowed down to at most four years: *Campbell* v. *Wilson* (6), approved by Lord Blackburn in *Dalton* v. *Angus* (7); anything except, it would seem, a lost modern Act of Parliament: *Reg.* v. *Chapter of Exeter*. (8)

Where, however, the existence of the lost grant is improbable, not in the abstract, but by reason of circumstances proved in or inferable from the evidence, the matter becomes one for consideration against the presumption. "We are driven to this inquiry," says Fry L.J. in *Halliday* v. *Philipps* (9): "are the

(1) [1911] A. C. 623, 633.
(2) 7 App. Cas. 633.
(3) 3 T. R. 151.
(4) [1893] 2 Q. B. 19.
(5) 6 App. Cas. 740.
(6) 3 East, 294.
(7) 6 App. Cas. 813.
(8) (1840) 12 Ad. & E. 512, 532.
(9) 23 Q. B. D. 48, 57.

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facts of this case more consistent with the plaintiff's theory of a lost grant, or are they equally consistent with that theory and with the theory of an unlawful possession throughout?" So, on the other hand, the intrinsic probability of an actual lost grant has constantly, and with increasing frequency in recent times, been dwelt upon as a point in favour of the presumption. Thus in *Foreman* v. *Free Fishers and Dredgers of Whitstable* (1) the actual existence, in fact, of a port, for which no grant was forthcoming, was duly inferred from the user proved, on the ground that the user actually pointed to such a port. In *Goodman* v. *Saltash Corporation* (2) Lord Selborne, at p. 644, and Lord Watson, at p. 665, expressly say that they think the presumption there made is "not only reasonable in law, but probable in fact." In *Attorney-General* v. *Horner* (3) Lord Selborne, after demonstrating on the evidence the probability that the market estate and the outer streets were laid out at the same time and by common consent of those interested in the market franchise of 1682, adds that it "is so consistent with the intrinsic probabilities of this case, ... that if I had as a juryman to draw an inference of actual fact, ... I should presume it to be the case that these streets were laid out in connection with these buildings and with this market." In *Halliday* v. *Philipps* (4) Lord Macnaghten presumes a lost faculty for the private pew, adding that he thinks the predecessors in title of the then pew-holders were probably advised to apply for one in the course of the eighteenth century, and did so. In *Harris* v. *Earl of Chesterfield* (5) both the noble Lords who affirmed and those who denied the possibility of a legal origin for the actual user proved, namely, the enjoyment of a profit à prendre without stint in a que estate, were agreed that the origin of the user proved was a question of probability and of fact. Can it be supposed that all these high authorities were at the pains to state the actual probability of the legal grant or other proceeding which they were presuming, if its probability was in law wholly immaterial?

In the great majority, if not in all, of the cases where a lost

(1) L. R. 4 H. L. 266, 282.
(2) 7 App. Cas. 633.
(3) 11 App. Cas. 66, 78.
(4) [1891] A. C. 228, 238.
(5) [1911] A. C. 623.

grant is presumed as the origin of a proved enjoyment, a lawful origin of the enjoyment, as distinguished from wrongful usurpation, is matter of proved probability. There must be few, I doubt if there are any, where the known facts or the inferences from them are inconsistent with such probability. The cases most relied on before us certainly present no difficulty. In *Bedle* v. *Beard* (1), *Hull Corporation* v. *Horner* (2), *Powell* v. *Milbanke* (3), and *Penryn Corporation* v. *Best* (4) the evidence shewed the actual probability of the lost titles, which were severally presumed. What is more probable than that a subject, having got a grant less wide than he could have wished, should pray the Sovereign to grant another to supplement its deficiencies? What is more probable, at least in early times, than that he should get it, if only he kept on the right side and bided his time? Having got two charters, what more likely than that he should lose one? The only wonder is that he should not have lost both.

The two cases reported in the *Law Reports*, 3 Queen's Bench, *Bryant* v. *Foot* (5) and *Lawrence* v. *Hitch* (6), are cases in which the presumption of immemorial usage from proof of usage during living memory is measured by the Court by purely historical tests of probability. The judges took judicial cognizance of the value of money in the time of Richard I., and, deciding respectively that 13*s*. was then exorbitant for a marriage fee, while 1*s*. as a toll on a load of vegetables was not, they rejected or upheld the presumption. In the former case Keating J. referred to authorities no more recondite than Hallam and Hume. If we took judicial cognizance of so ordinary a book as Strype's Stow's Survey (ed. 1755 ii. 48) we should find some curious information about Spitalfields, formerly Lollesworth Fields, in law doubtless inadmissible but still such stuff as history is made of. At any rate, in *Bryant* v. *Foot* (5) the Court of Queen's Bench measured the possibility of presumption by the probability of the actual facts to be presumed. After all, in a country which has long enjoyed systematic

(1) 12 Rep. 5.
(2) 1 Cowp. 102.
(3) 1 Cowp. 103, n.
(4) 3 Ex. D. 292.
(5) L. R. 3 Q. B. 497.
(6) L. R. 3 Q. B. 521.

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law and settled government, a lawful origin for long established enjoyment is the rule, and usurpation is the exception. Things as they are rest on "the common consent of all whose consent was necessary": *Attorney-General* v. *Horner* (1); they result from the consent or acquiescence of those whose right it was to interfere by process of law and whose interest it was not to suffer them to continue unless of their own free will. "The presumption in Courts of law from length of time stands upon a clear principle; built upon reason, the nature and character of man, and the result of human experience. It resolves itself into this; that a man will naturally enjoy what belongs to him": per Lord Erskine L.C. in *Hillary* v. *Walker*. (2) Conversely, it may be said, what you find a man openly enjoying as his own will naturally be his own. Even where the strong have oppressed the weak, the assent of the latter, though grudging and resentful, has as a rule actually been given.

Whatever doubts there may have been about these principles (and as recently as 1896 it is said in Goddard on Easements, 5th ed. p. 162, not yet to be settled whether these presumptions are rebuttable) I think now the uniform consensus of dicta and decisions for many years has set them at rest. For older decisions it is useful to refer to *Eldridge* v. *Knott* (3); *Griffiths* v. *Matthews* (4); *Doe* v. *Millett*. (5) For dicta I will mention the following:—*Shephard* v. *Payne*, per Blackburn J. (6); "This qualification (that the contrary be not proved), pervades the authorities": per Kelly C.B. in *Bryant* v. *Foote* (7); "The cases which have been referred to in support of presumptions from long usage will be found to have been cases where the origin of the rights said to exist has been lost in obscurity, and there has been nothing but the evidence of immemorial user. Here that is not so. We know the origin of the franchise:" Lindley L.J. in *Attorney-General* v. *Horner*. (8) "Where there has been long-continued possession in assertion of a right . . . . the right should be presumed to have had a legal origin if such a legal

(1) 11 App. Cas. 66, 78.
(2) 12 Ves. 239, 265.
(3) 1 Cowp. 214.
(4) 5 T. R. 296.
(5) 11 Q. B. 1036, 1049.
(6) 16 C. B. (N.S.) 132, 135.
(7) L. R. 3 Q. B. 497, 507.
(8) 14 Q. B. D. 266.

origin was possible, and the Courts will presume that those acts were done and those circumstances existed which were necessary to the creation of a valid title . . . . Why does not the doctrine . . . . apply just as well to the acts necessary to confirm a title originally invalid as to the acts necessary to create a valid title in the first instance? . . . . No doubt if the subsequent enjoyment is shewn to be consistent rather with the right thus invalidly acquired . . . . than consistent with its having been made a legal right, the presumption would be unjustifiable, because you would then have its illegal origin shewn; . . . . you could not be justified in making the presumption—the presumption would be rebutted by the facts": per Lord Herschell in *Halliday* v. *Philipps*. (1) "There is certainly no need to resort to the presumption of a lost grant when the facts of the case, so far as they are known, suggest a much simpler and more natural explanation": per Lord Macnaghten in *Gardner* v. *Hodgson's Kingston Brewery Co.* (2) The doctrine of a lost grant "only applies where the enjoyment cannot be otherwise reasonably accounted for": per Lord Lindley. (3) "When long and continuous enjoyment is established, a lawful origin will be presumed if it is reasonably possible. . . . . I do not say that we are entitled to presume anything which, upon the facts of the particular case, is impossible": per Earl Loreburn L.C., *Harris* v. *Earl of Chesterfield*. (4) The fact is that the appellant's argument involves a vicious dilemma. If we presume a lawful origin for this market from such mere lapse of time as would ripen usurpation into a semblance of respectability, we are passing a prescription Act when Parliament did not think fit to do so in 1832. If we endow the proved enjoyment with a pedigree and a suitable root of title, we must juggle with the facts. The first is legislation, the second legerdemain. I am of opinion that we are bound to reject all the presumptions pressed upon us, as being contrary to principle and inconsistent with the whole of the evidence in the case.

It is further objected to the appellant's case that, if all presumptions are made in his favour, still no legal origin such as is

(1) [1891] A. C. 231, 236.
(2) [1903] A. C. 229, 235.
(3) [1903] A. C. 240.
(4) [1911] A. C. 623, 627.

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pleaded can possibly be deemed to arise. Part, at least, of the outer streets must have been the property of strangers. The appellant does not know the original boundaries of the market estate. Possession only carries him to the street edge; presumption will take him only usque ad medium filum; yet his user and his claim cover the whole area of the outer streets. He relies in substance (paragraph 18 of the amended defence) though not in terms on a presumed lost grant of an easement appurtenant to the market estate—"a right," as he calls it, "in perpetuity, appurtenant to the market estate to carry on the said de facto market."

Now it is well settled that an easement appurtenant must be for the benefit of the inheritance to which it is appurtenant. It must be "beneficial to the land and beneficial in respect of the ownership of the land, and not beneficial to any other person": per Willes J., *Bailey* v. *Stephens*. (1) "It must have some natural connection with the estate as being for its benefit": per Byles J. (2) How does it benefit the inheritance, namely, the market estate, that buyers and sellers should assemble and traffic inter se on the servient tenement, the present streets? They do nothing ancillary to any business on the market estate, nor do they benefit the inheritance. Ex hypothesi, they traffic on the servient tenement only because they cannot get into the dominant tenement. They may never go to it in exercise of the easement at all. They may have no connection with what is going on upon the dominant tenement. The only answer that can be given is that the benefit consists in the market-holder's taking tolls on their transactions; but even if he is entitled to do so, which he is not, how does that benefit the inheritance? The exercise of the market franchise, qua the inheritance, is a severable accident.

It is admitted that no instance can be found of such a servitude unless the language of Lord Selborne in *Attorney-General* v. *Horner* (3) supplies the authority and makes this market itself the instance. That language, if looked at, clearly has nothing to do with the grant of rights over a servient tenement exercisable

(1) 12 C. B. (N.S.) 112. (2) 12 C. B. (N.S.) 115.
(3) 11 App. Cas. 66.

in respect of a dominant one. Throughout it is assumed that the whole soil of the outer streets was dedicated and laid out by persons who were jointly interested in the exercise of the market franchise, whether legally or beneficially. It is not put as a case of an easement, but of a joint dedication by joint owners of the market franchise, subject to reservations of the exercise of their joint market rights. As to other authority, in *Hill* v. *Tupper* (1) the Court remitted the claimant of a somewhat similar right to his personal cause of action against his grantors, though he occupied a riparian tenement and exercised the right from its bank. After carefully considering all the cases cited and some others I can find nothing to lend colour to this claim. So far as the appellant's presumption is a presumption of a right in the nature of an easement appurtenant to the market estate, I think it is bad, for it seeks to presume a right unknown to the law. The appellant's half of the roadways ad medium filum may stand on a different footing. Here the assumption is that his predecessor dedicated his own land, subject to his right to assemble his customers and give them leave and licence for their waggons on the roadway as he had done theretofore. Though the contrary has been argued, I do not see why the power to make reservations upon a dedication of a highway should be limited to matters which could validly be the subject of grants of easements in alieno solo in favour of strangers. *Elwood* v. *Bullock* (2) shews that a street can be dedicated subject to a right to hold a market on it from time to time, and this is so even though the dedication be pursuant to a statute: *Gingell, Son & Foskett, Ld.* v. *Stepney Borough Council.* (3) This, however, does not help the appellant, for his theory of presumed dedication fails upon the general ground that it is inconsistent with all the facts and is a mere fiction from beginning to end.

The appellant's remaining point is that, however wrong he may be in the action, no injunction ought to go against him as a matter of discretion. First, he says it suits a great many other people besides himself that he should continue in wrong-doing. The contention has only to be stated to be dismissed. Next he

(1) (1863) 32 L. J. (Ex.) 217. (2) (1844) 6 Q. B. 383.
(3) [1908] 1 K. B. 115.

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says that no injunction went in the former action of *Attorney-General* v. *Horner*. (1) Such good fortune does not happen twice in a lifetime. Further, the circumstances have changed, and are much better known now than then. Among other things, we know that Mr. Horner has claimed and taken tolls every weekday as of right for many years after *Great Eastern Ry. Co.* v. *Goldsmid* (2) decided that the known market franchise is for two days only, and this Court in *Attorney-General* v. *Horner* (1) had decided that no other could be presumed. I agree that the Attorney-General is entitled to an injunction and that the appeal must be dismissed with costs.

The first case made on the cross-notice of appeal was that the tolls were outrageous, rank, and unreasonable. It is true this is a question for the Court and not for a jury: *Gard* v. *Callard*. (3) Still Warrington J. has found that this case was not proved, and were it necessary to decide this I should not be prepared to disagree with him. The great bulk of the evidence relates to commutations of tolls agreed, after more or less grumbling, between the sellers and Mr. Horner. This is of little value when the question relates to the reasonableness of actual tolls. No single toll is proved to be in itself unreasonable, and as this market has thriven and increased greatly, I should think the market people had found them reasonable enough. It is not as though they had not other markets to go to. It is said that Warrington J. misdirected himself, because he thought that a commercial view might be taken of this question, and that in fixing tolls Mr. Horner might have some regard to his rent, rates, and taxes like other people. I cannot see why he should not. "Live and let live" must apply to markets as to other trades. The justification for the grant of a monopoly of market is that the existence of the market is for the benefit of the public. If the market keeper is not to get his outlay back and something more, he will give up the market, and where will the public be then? See the observations of Lord Macnaghten in *Simpson* v. *Attorney-General*. (4)

(1) 14 Q. B. D. 245; 11 App. Cas. 66.
(2) 9 App. Cas. 927.
(3) 6 M. & S. 69.
(4) [1904] A. C. 476, 483.

Then it is said that the tolls ought to be published and should be uniform. The first point is not in the notice of appeal and no authority is cited for it. As to the second, the taking of a smaller sum from A. does not of itself prove that the larger sum taken from B. is outrageous or unreasonable. Farwell J. (*Duke of Newcastle* v. *Worksop Urban Council* (1)) has decided the contrary. True, Abbott C.J. and Bayley J. in *Duke of Bedford* v. *Emmett* (2) treat the point as open, and perhaps suggest a contrary inclination; but they certainly do not decide it, nor was any authority cited to or by them. It is not illegal to take less than your rights. Even a market keeper may do what he will with his own.

Further it is said that Mr. Horner always takes tolls from the sellers and never from the buyers, and he admits the fact and says it cannot be otherwise, and that he is justified in it and intends to do so in future. No question of contemporanea expositio arises. There is no ambiguity or vague generality about the grant. The true question is whether the tolls granted in the charter of Charles II., "cum tolnetis . . . . ad hujusmodi mercatum spectantibus," are tolls to be taken from the buyer or the seller. This depends on what was then understood to be the common law. Reference to the passage in Coke's 2nd Inst. (ch. 31, p. 221) is enough to shew that the tolls were then understood to be taken from the buyer and not from the seller in the absence of special custom. The authorities cited, which are all one way, satisfy me that such was and is the common law. I am unable to agree with Warrington J. that the seller must be deemed to be paying toll for the buyer. Economically this principle has been much debated. There is no evidence of any agreement in fact between buyer and seller that the latter should do so. As to the appellant, he clearly has been party to no such thing, but has claimed and claims to levy tolls on the seller as his right. It follows, at first sight, that Mr. Horner is, and always has been, in the wrong, and, since he intends to go on, must be restrained by injunction.

But it is said that on better consideration it will be seen that

(1) [1902] 2 Ch. 145. (2) 3 B. & Al. 369, 370.

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this is a mistake; the greater the difficulty the greater the presumption; it is really quite simple. I am not sure that I have apprehended it rightly, but, as I understand it, the appellant's answer is this. Once upon a time, before the days of Richard Cœur de Lion, there was a King of England, and he granted to some of his subjects the right to hold a market in sive juxta Spital Square. Nothing more is known save this, that the market was held every weekday and enjoyed the special custom that the sellers paid the market tolls. Perhaps the grantees could not make it pay and surrendered it; perhaps they misconducted and forfeited it. At any rate, in time the King had it again. As the King had originally created it, this Spitalfields Market did not merge in the other "flowers of his crown," his wreccum maris and his deodands and his catalla felonum which he had jure coronae, but remained in him, maintaining an independent though suspended existence with its old appendency to Spital Square still subsisting till it should please him to grant it again, all of which was agreed in the case of the *Abbot of Strata Mercella.* (1) Now, in 1682 Charles II. granted what he and his ministers, and the grantee, John Balch, Esquire, too, no doubt all thought to be a new market with tolls to be taken from the buyer, and so all the lawyers of that day would have advised them. But they were all wrong. Instead of that (or is it perhaps in addition, so that both buyers and sellers may now be liable to pay toll?) the immemorial Spitalfields Market, which had been in abeyance time out of mind, was effectually regranted with its ancient incident that the sellers are liable to pay tolls. Thus all is once more for the best. If Mr. Horner has misunderstood the charter of 1682 and relied on it alone as his justification, he is not the first person by many to be unaware of the hidden springs of his actions. I do not think it necessary to do more than state this contention. I do not say that there might not be cases to which some such presumption would apply, but I am sure this is not one of them.

In the result the cross-notice of appeal succeeds as to the imposition of tolls on the seller, as to which the Attorney-General is entitled to have the judgment dismissing his action

(1) 9 Rep. 25b.

set aside and to have his declaration and injunction as prayed. I agree in the order proposed as to costs.

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Appeal dismissed; cross-appeal allowed.

Solicitors: *Edward Betteley; Sir Homewood Crawford.*

H. C. R.

In re ROBERT STEPHENSON & CO., LIMITED. POOLE *v.* THE COMPANY.

C. A. 1912 — *June* 25.

[1909 R. 910.]

Mortgage—Debenture—Priority—Construction—Floating Charge—Company restrained from creating Further Charge in Priority to First Debentures—After-acquired Property—Specific Mortgage subject to Provisions of First Security.

By a debenture stock trust deed a company gave a specific and a floating charge reserving power to deal with its assets but not to create any further charge over its property generally to rank pari passu with or in priority to or otherwise than subject or in subordination to the security thereby created. After the date of this deed the company purchased freeholds. By a subsequent debenture stock trust deed the company granted to trustees and their heirs certain freeholds, including the after-acquired property, by way of mortgage, upon the trusts thereinafter mentioned, subject to the provisions of the first deed. The second deed also contained a general charge on all the company's assets subject to the first issue. The security constituted by the first deed was now crystallized:—

Held, affirming the decision of Parker J., that the security of the debenture stock holders under the second deed was postponed to that of the stockholders secured by the first deed.

APPEAL from a decision of Parker J.

By a debenture trust deed dated August 21, 1899, and made between Robert Stephenson & Co., Limited, of the one part and certain trustees of the other part, the freehold hereditaments specified in the first part of the first schedule thereto were granted, and the leasehold hereditaments specified in the second and third parts of the same schedule were demised or covenanted to be demised to the trustees by way of specific security for the issue of 250,000*l.* debenture stock therein referred to; and by

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clause 9 "The company hereby charges in favour of the present trustees all its assets for the time being both present and future (including its uncalled capital if any) with the payment of all moneys for the time being owing on the security of these presents and such charge shall (except as to property legally vested or agreed to be legally vested in the trustees) rank as a floating charge and shall accordingly in no way hinder or prevent the company from selling alienating mortgaging charging leasing paying dividends out of profits or otherwise disposing of or dealing with such assets in the ordinary course of its business and for the purpose of carrying on the same, but so that (subject as hereinafter mentioned) the company shall not have power so long as any of the stock hereby secured shall remain outstanding to create any further charge on or over its undertaking or property generally to rank pari passu with or in priority to or otherwise than subject and in subordination to the security hereby constituted."

In the year 1900 the company purchased freehold lands at Darlington which thereupon became subject to the floating charge created by the trust deed.

In the year 1903 the company made an issue of 100,000*l.* debenture stock, known as "A" stock, secured by a trust deed dated September 7, 1903. By this indenture, which was made between the company of the one part and certain trustees of the other part, it was provided by clause 1 that the expression "the first issue" should mean the stock secured by the first trust deed or such part thereof as should for the time being be outstanding. By clause 9 the company granted to the trustees and their heirs the several freeholds specified in the first part of the first schedule thereto by way of mortgage upon the trusts and for the purposes thereinafter mentioned subject to the provisions of the first trust deed. The first part of the first schedule comprised not only the freeholds specifically mortgaged by the first deed, but also the subsequently acquired Darlington property; and the question was whether the specific charge on this property created by clause 9 of the second deed was or was not subject to the floating charge created by the first deed. By clause 10 of the second deed the leaseholds were similarly demised subject to the provisions of the

first deed. By clause 12 the company charged in favour of the trustees all its other assets for the time being, both present and future, and that charge was "subject to the said first issue" to rank as a floating charge. By clause 27 the principal moneys and interest thereby secured were to be a charge on the mortgaged property subject to the first issue.

In 1909 a receiver of the company's property was appointed and default was made in payment of interest; and the security constituted by the first deed thereupon became crystallized.

A holder of debenture stock secured by the first deed brought this action for realization of his security and claimed that his stock constituted a first charge on all the assets of the company.

Parker J. held on the construction of the deeds that it was clearly contemplated that the security of the stockholders of the later issue was postponed to that of the stockholders of the first issue; and that when the floating charge created by the first deed crystallized the trustees of that deed obtained a fixed security on the Darlington property ranking in priority to the security of the trustees of the second deed.

Holders of debenture stock under the second deed appealed.

Martelli, K.C., and *R. H. Hodge*, for the appellants. This question depends entirely on the construction of the two deeds. Clause 9 of the first deed refers only to general floating charges and does not affect specific mortgages like that contained in the second deed. There are three securities in the second deed, a conveyance upon trust for sale, a charge on other assets than freeholds and leaseholds, and a general charge on freeholds, leaseholds, and other assets. It is only the last of these that is affected by clause 9 of the first deed. Under the first deed the company still had power to specifically mortgage subsequently acquired property in our favour.

Romer, K.C., and *G. M. Simmonds*, for the debenture stock holders secured by the first deed, and

Maugham, for a trustee of the first deed, were not called upon to argue.

COZENS-HARDY M.R. This is an appeal from a decision of Parker J. The company was a limited company and it was minded

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to borrow a large sum on debentures in 1899, and it borrowed a quarter of a million. It gave to trustees a legal mortgage of such freehold property and an assignment of such leasehold property as it had then, and those two clauses were followed by clause 9, which gave to the first debenture holders a floating charge upon any future property which the company might acquire. Such a charge could of course only be an equitable charge. Now a question might arise under clause 9 of that deed, but at present contrary to my own view I assume in favour of Mr. Martelli that under that clause it would have been competent for the company if it was so minded to give a specific security upon any after-acquired real estate. Assuming that in his favour, the question is, have they done it? In 1903 the company wanted to borrow 100,000*l.* more. They had in the interval between 1899 and 1903 acquired certain freehold property, and that freehold property is specified in the schedule to the second deed. This second deed includes the freehold property which was legally mortgaged in 1899. It also includes other items which were freehold property acquired in 1900. That being the state of things, let us see what the company did. By clause 9 of the second deed "The company as beneficial owner hereby grants unto the trustees and their heirs all and singular the freehold lands and hereditaments of which particulars are specified in the first part of the first schedule hereto"—it does not say the 1899 parcels and the subsequently acquired freeholds—"to hold all the said premises unto and to the use of the trustees their heirs and assigns as and by way of mortgage upon the trusts and for the purposes hereinafter mentioned subject to the provisions of the said deed of the 21st day of August, 1899." Therefore it is quite plain that it did not purport to convey only what I call the 1899 property subject to the provisions of that deed, but everything is made subject to the provisions of the deed of August 21, 1899. I have looked at the deed of August, 1899, and I ask what are the provisions in that deed which are applicable not merely to item 1 but to items 2, 3, and 4. The answer is quite plain. There is an equitable charge in favour of the first debenture holders contained in clause 9. That being so, it is unnecessary to consider whether the company might, if it had

been so minded, have said, "We give a charge depriving the first debenture holders of their security to the utmost farthing that we can." It was not bound to do that, but what it did say was, "We leave the first debenture holders exactly in possession of everything which they got under the first deed and subject only to that we give a charge to the new debenture holders." That in short is the view which Parker J. has taken; that is the view on the assumption most favourable to the appellants' contention as to the meaning of the first deed, and accepting that for the purpose of the argument, I think that Parker J. was quite right, and that the security given by the first deed takes priority over the second not merely as to the 1899 property, but also as to the subsequently acquired property.

FARWELL L.J. I am of the same opinion. In my view clause 9 of the original deed intends to charge this after-acquired property by way of floating charge and to add the usual clause that so long as it remains floating the company is entitled to deal with it in any way it pleases, selling, alienating, mortgaging, and so on, but followed by a qualification which I understand to mean this: so long as this is a floating charge, if you, the second debenture stock holders, have a specific mortgage you can sell or foreclose or do anything you like with the property, the first debenture holders' floating charge is not to interfere with that; but directly the first charge is crystallized, then if you have not previously sold your mortgaged property you come within the phrase used here, "The company shall not have power so long as any of the stock hereby secured shall remain outstanding to create any further charge on or over its undertaking or property generally to rank pari passu with or in priority to or otherwise than subject and in subordination to the security hereby constituted." The dealing with the property comprised in the specific mortgage by the second mortgagees is allowed until the first mortgage security is crystallized. These words exclude any possibility of contesting that the company can create a charge which in that event will give a priority to the first stock holders. As regards the construction of the second deed it puts the property therein comprised all in one class, as the Master of the

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Rolls has pointed out, the previously-acquired and the after-acquired property all ranking together. I think Parker J. was right.

KENNEDY L.J. I agree and for the same reasons.

Appeal dismissed.

Solicitors: *W. A. Crump & Son; Slaughter & May; Rawle, Johnstone & Co., for Cooper & Goodger, Newcastle-on-Tyne.*

H. C. R.

WARRINGTON J. 1913 — *April* 29.

In re RAGGI.

BRASS *v.* H. YOUNG & CO., LIMITED.

[1913 R. 217.]

Limitations, Statute of—Will—Residuary Devise and Bequest—Trust to pay Debts out of Mixed Fund—Debt, whether barred against Personal but not against Real Estate—Limitation Act, 1623 (21 *Jac.* 1, *c.* 16)—*Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57).

Testator, by his will, devised and bequeathed his residuary real and personal estate to trustees upon trust for sale and conversion, and out of the moneys produced from such sale and conversion to pay his funeral and testamentary expenses and debts, and to hold the residue upon certain trusts. He died in November, 1907. Shortly after his death the defendant company made a claim for 902*l.* against his estate in respect of a debt which, as the Court held, arose in and subsequently to 1903, but took no steps to enforce it. On a summons by the trustees to determine the question whether the defendant company were creditors of the testator to any and (if so) what amount:—

Held, that the testator by creating a mixed fund and imposing a duty not on the executors but on the trustees of paying his debts out of that mixed fund had created a charge not of a part but of the whole of the debts on the real estate, and that it could not be said that any part of the debts was attributable to the personal estate.

Held, therefore, that no part of the defendant company's debt was barred by the Statute of Limitations.

Query raised by Kay J. in *In re Stephens* (1889) 43 Ch. D. 39, 45, answered in the negative.

ADJOURNED SUMMONS.

Mario Raggi, by his will dated May 17, 1907, after appointing executors and trustees thereof, devised and bequeathed to them

all the residue of his real and personal estate upon trust for sale and conversion, and out of the moneys produced from such sale and conversion to pay his funeral and testamentary expenses and debts, and to hold the residue upon trust for the persons therein mentioned.

The testator died on November 26, 1907.

Shortly after his death the executors received from the defendant company a claim against the estate for 902*l.* 1*s.* 10*d.*, being 894*l.* 6*s.* 1*d.* for cash advanced and work done in and before the years 1891 and 1895 and 7*l.* 15*s.* 9*d.* for goods sold in the year 1906. The debt was not then paid and the defendant company took no proceedings to enforce their claim.

The question having now been raised whether the debt was not barred by the Statute of Limitations, the trustees took out the present summons for the determination of the question whether the defendant company were creditors upon the estate of the testator to any and (if so) what amount.

From the evidence it appeared that for some years prior to 1903 there had been a running account between the testator and the defendant company; that in February, 1903, a meeting took place between the testator and the managing director of the defendant company, at which the items and details in the defendant company's books were discussed and gone through at length; that the testator required certain credits to be given him thereon; and that the managing director ultimately arranged with the testator that certain items in the defendant company's account against the testator should be divided between the defendant company and the testator, i.e., that each of them should bear half the amount of such items.

The personal estate of the testator had been sold and realized, but the proceeds were insufficient to pay the funeral and testamentary expenses and debts, exclusive of the 902*l.* 1*s.* 10*d.* claimed by the defendant company.

The real estate consisted of certain freehold houses producing a gross annual rental of about 360*l.*

Warrington J. held upon the evidence that the debt arose in and subsequently to February, 1903, and was therefore not barred at the testator's death.

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The only matter calling for a report was whether, having regard to the query raised by Kay J. in *In re Stephens* (1), the debt had subsequently become barred to the extent to which the rateable portion of it attributable to the personal estate was concerned.

Charles Church, for the summons.

M. J. L. Beebee, for the defendant company. The debt not having been barred at the testator's death on November 26, 1907, the trust for payment of debts out of the proceeds of the sale of the real and personal estate will keep it alive for twelve years from that date. There is no foundation for the suggestion made by Kay J. in *In re Stephens* (1) that under a will like that in the present case, where real and personal estate are blended together and subjected to a trust for payment of debts, a debt may be barred as to the rateable portion of it attributable to the personal estate but kept alive as to the rateable portion of it attributable to the real estate. A debt cannot be partly barred and partly kept alive: *Rendell* v. *Carpenter* (2); *Hughes* v. *Wynne* (3); *Burke* v. *Jones* (4); *Scott* v. *Jones*. (5)

A. Underhill, for the residuary legatees. It is admitted that a charge of debts on real estate is barred only after the lapse of twelve years from the testator's death. It is, however, only that part of the debts which is attributable to the real estate that is constituted a charge on the real estate. That part of the debts which is attributable to the personal estate is barred after the lapse of six years from the date when the debts arose. In the present case, more than six years having elapsed since the indebtedness arose, so much of the debt of 902*l.* 1*s.* 10*d.* as is attributable to the personal estate is barred. The query raised by Kay J. in *In re Stephens* (1) is in point and should be answered in the affirmative.

WARRINGTON J. stated the facts and held that the proper conclusion to be drawn from them was that the debt arose in and subsequently to February, 1903, and that it was therefore not

(1) 43 Ch. D. 39, 45.
(2) (1828) 2 Y. & J. 484.
(3) (1823) T. & R. 307.
(4) (1813) 2 V. & B. 275.
(5) (1838) 4 Cl. & F. 382, 397.

barred at the testator's death. He continued: The next question is, Has that debt since become barred because more than six years since February, 1903, have elapsed without the creditors taking any proceedings for its recovery? The answer to that question depends on the effect to be given to the provision in the testator's will with regard to the payment of debts. It is clear on the authorities that a direction to pay debts out of the proceeds of sale of real and personal estate operates, so far as the real estate is concerned, as a charge thereon. The debt in the present case is not at any rate barred so far as the real estate is concerned whether the time is to be deemed to run from the date of the testator's death or from the date when the debt arose, because in either case the period is within the twelve years fixed by the Real Property Limitation Act, 1874. So far therefore as the real estate is concerned there is no question that the debt is not barred by the Statute of Limitations. The only question is whether the debt is barred so far as it would be properly attributable to the personal estate. The contention on the part of those who are entitled to the residuary estate is that the query raised by Kay J. in *In re Stephens* (1) ought to be answered in the affirmative. Kay J. said: "According to the series of cases which were considered in *Allan* v. *Gott* (2), such a direction as there is here would make the debts payable rateably out of the real and personal estate. It is quite open to argument whether such part of the debt as is properly attributable to personal estate ought not to be considered to be barred. But I leave that for consideration when I know the facts." It does not appear from the report whether the case came again before him when the facts were ascertained. I have therefore to consider the question as free from authority at any rate so far as that query is concerned. The present case is not one in which the debts are charged on the real estate in aid of the personal estate. It is a case of a trust for sale and conversion and to pay debts with a direction to the trustees to pay them out of a mixed fund. Can I say under those circumstances that any portion of the debts is attributable to the personal estate? I do not think I can. It seems to me in the present case that the testator by creating a

(1) 43 Ch. D. 39, 45. (2) (1872) L. R. 7 Ch. 439.

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mixed fund and imposing a duty not on the executors but on the trustees of paying his debts out of that mixed fund has created a charge not of a part but of the whole of the debts on the real estate. It cannot be said that any particular part of the debts is attributable to the personal estate. It seems to me therefore that the defendant company's debt is not, nor is any part of it, barred by the Statute of Limitations. I find that the testator's estate is indebted to the defendant company in the sum of 902*l.* 1*s.* 10*d.*

Solicitors: *Johnson, Weatherall & Sturt, for Potter & Crundwell, Farnham; H. C. Morris & Co.; T. Duerdin Dutton.*

W. I. C.

NEVILLE J.
1913
May 20, 21.

In re RAYER.
RAYER *v.* RAYER.

[1896 R. 479.]

Settled Estates — Power of leasing—Tenant for Life—Statutory Powers—Mining Lease—Rents and Profits—"Contrary Intention"—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 11.

A settlement of real estates empowered any male tenant for life in possession or the trustees of the settlement, if the tenant for life should be a female or an infant, to grant leases of open and unopened mines and directed in effect that the whole of the rents and royalties under such leases were to be applied as income. A female tenant for life in possession granted mining leases in exercise of her powers under the Settled Land Act, 1882:—

Held, that the rents and royalties under the leases were to be applied as directed by the settlement and not in accordance with s. 11 of the Act.

ADJOURNED SUMMONS.

This was an application to determine how the rents and royalties arising under mining leases granted by a tenant for life were to be applied.

W. Rayer by his will dated August 10, 1882, appointed his wife, the plaintiff Charlotte Rayer, his sister the defendant Jane Rayer (since deceased), his sister the defendant Helen Rayer, and the defendant R. Spence the executors and trustees of his will. And the testator, after making divers specific bequests, devised

his real estates in the counties of Devon and Somerset to the use of his trustees for a term of 1000 years without impeachment of waste upon the trusts thereinafter declared, and subject thereto limited the said estates to uses to secure a jointure for his said wife and divers rent-charges for his said sisters and numerous other relatives; and, subject as aforesaid, devised the estates to the use of his said wife during widowhood, with remainder to the use of his sister Jane Rayer for life, with remainder to his sister Helen Rayer for life, with divers limitations over in strict settlement under which (as altered by a codicil and in the events that happened) the defendants William Newman and Francis Davidson, both infants, were respectively and successively tenants in tail in remainder. And the testator declared that every estate for life to which any person might become entitled under his will should be subject to impeachment for waste, as well permissive as active, except that such person should have power to cut timber and work mines, quarries, and mineral substances for the purpose of applying such timber and mineral substances with the consent of the trustees in repairing and other improvements upon the settled estates, and the testator declared that throughout his will an estate the enjoyment of which should be subject merely to the said term of 1000 years and to the trusts thereof and to such of the rent-charges as should for the time being be payable should be deemed to be an estate in actual possession. The trusts of the term of 1000 years empowered the trustees (inter alia) to cut and plant timber, to work and open and work mines and minerals, and to apply the timber and minerals in repairs and improvements of the settled estates, or to sell the same and to invest and accumulate the proceeds of sale, and to hold the accumulated fund upon the trusts upon which moneys arising from the exercise of the power of sale of the settled estates thereinafter contained were directed to be held, and when such trust for accumulation should cease to be lawful to pay or apply such proceeds to the person or persons or in the manner to whom or in which the same would be applicable or payable if the same were income arising from the settled estates; and further directed the trustees out of the rents and profits of the settled estates to keep down the jointure and rent-charges and all outgoings, and

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to pay the residue of the said rents and profits to the person for the time being entitled in remainder immediately expectant on the said term of 1000 years. The will also contained a power for any person who (being a male) should for the time being be of full age and entitled as tenant for life to the possession or to the receipt of the rents and profits of the trust premises subject to the said term of 1000 years, or for the trustees, in case such tenant for life should be a female or a minor, to grant leases of open or unopened mines for sixty years, with the usual stipulations and provisions. And the testator declared that the rents and royalties to be reserved under any mining lease should as far as practicable be subject to the trusts for accumulation thereinbefore contained, and the testator empowered his trustees to sell or exchange any of the trust premises, and directed that the proceeds of sale should be invested in the purchase of lands, and that the lands so purchased or taken in exchange should be settled upon the uses, limitations, and trusts of the will.

The testator died on January 11, 1892, and his will and codicil were proved by all the executors.

In 1896 this action was commenced by originating summons for the administration of the testator's estate and a receiver was appointed.

Jane Rayer died in 1912.

In 1901 the plaintiff in exercise of her powers as a tenant for life under the Settled Land Acts granted a lease for sixty years of a quarry, and in 1908 she as tenant for life as aforesaid granted a lease for twenty-one years of another quarry, both quarries being on the settled estates, and the rents and royalties arising under these leases were accumulated in Court under orders of the Court.

On January 11, 1913, being twenty-one years from the death of the testator, the trust to accumulate mining rents and royalties under the term of 1000 years came automatically to an end. The question then arose as to how the accumulations and the future rents and royalties under the leases were to be applied, and the plaintiff took out a summons to determine the matter.

Northcote, for the plaintiff. No question arises as to the timber because by s. 2 of the Thellusson Act timber is specially exempted from the operation of the Act. But as to the mineral rents and royalties the question is whether they are to be dealt with under s. 11 of the Settled Land Act, 1882, or whether a "contrary intention" is shewn by the trusts the settlor has declared in his will. The point was considered in the case of *In re Duke of Newcastle's Estates* (1), but there it was intended to grant leases under the powers in the settlement and not under the Settled Land Act, and the decision of Pearson J. that there was a contrary intention expressed in the settlement was really a dictum. Then in *In re Bagot's Settlement* (2), which is more like this case, the point is not mentioned in the arguments, but Chitty J. at the end of his judgment said that with reference to the mining leases a contrary intention was shewn in the settlement. *In re Daniels* (3) may be cited against me, but it is distinguishable. There there was no power in the will to grant leases of unopened mines, and a lease of an unopened mine was granted under the Settled Land Act, 1882. Here there are full powers to grant mining leases, and the stipulations and provisions to be inserted in a mining lease are substantially the same as those in a mining lease granted under the statutory power, and the settlor directs how the rents and royalties are to be applied. It is submitted, therefore, that the directions in the will amount to a "contrary intention" within the meaning of s. 11 of the Settled Land Act, 1882, and that the whole of the rents and royalties go as income under the trusts of the will. [He also referred to *Earl of Lonsdale* v. *Lowther*. (4)]

Sheldon, for the defendant Helen Rayer and other parties in the same interest, supported this contention.

Hurst, for the infant tenants in tail in remainder. It is submitted that the point now raised has not really been directly dealt with in any of the cases cited, and that it is res integra. *In re Duke of Newcastle's Estates* (1) was not a decision on s. 11 of the Settled Land Act, 1882, as pointed out in Wolstenholme's Conveyancing and Settled Land Acts, 9th ed. p. 351. I admit

(1) (1883) 24 Ch. D. 129, 135, 143.
(2) [1894] 1 Ch. 177, 184.
(3) [1912] 2 Ch. 90.
(4) [1900] 2 Ch. 687.

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that in *In re Bagot's Settlement* (1) Chitty J. decided the point, but it was not argued, and the main question in the case was whether an equitable tenant for life was entitled to be let into possession of the settled estates. In *In re Daniels* (2) Swinfen Eady J. points out that a mere direction to pay rents and profits is not a sufficient indication of a contrary intention within s. 11. Here there is not sufficient in the will or the provisions of the 1000 years term to indicate that the ordinary rule in s. 11 is not to be followed.

Eardley-Wilmot, for the defendant R. Spence.

Dutton, for some of the parties entitled to rent-charges.

NEVILLE J. Under the settlement in the present case the testator has provided for the granting of mining leases, and he has also provided for the accumulation of the rents and royalties under the mining leases for so long a time as the law allows. During that period the rents and royalties affected by the trusts for accumulation have been accumulated, and the period has now expired. The tenant for life has, not under the power contained in the settlement but under the power contained in the Settled Land Act, 1882, granted mining leases, and the question arises whether the provisions of s. 11 of that Act with regard to the application of the rents and profits arising from a mining lease granted under the power contained in that Act are to apply, or whether there is a "contrary intention" expressed in the settlement. There is no express declaration in the settlement with regard to these particular rents, and if a contrary intention is expressed it must be inferential and not direct because the settlement deals only with the rents and profits arising from a mining lease granted under the power contained in the settlement, and the mining lease in question is not granted under that power, but under the power contained in the Settled Land Act, 1882, which is a different power. The question therefore is whether, having regard to the origin of the lease, the rents and profits are to go in the way in which the settlor has directed that the rents and profits arising from mining leases granted under the power contained in the settlement are

(1) [1894] 1 Ch. 177, 184. (2) [1912] 2 Ch. 90.

to be applied, or whether they are to go in the way directed by the Act.

There is some authority upon the point. In *In re Bagot's Settlement* (1), before Chitty J., the point was, I think, directly decided. He there held that, where a settlement directs the rents and profits of the settled estates to be paid to the tenant for life and contains a power to grant mining leases, that is a "contrary intention" with regard to rents and royalties arising from a lease granted under the power contained in the Act. The point does not seem, as far as the report goes, to have been argued, although it was so decided. In the case of *In re Duke of Newcastle's Estates* (2), before Pearson J., the point was assumed to arise, and he came to the conclusion on the provisions of the settlement before him that the general direction in the settlement with regard to the rents and profits, if there is a power to grant mining leases, amounts to an intention contrary to the provisions of s. 11. I must say it seems to me that in the case before Pearson J. the question did not in fact arise at all, because I think it was proposed to grant leases under the powers contained in the settlement and not under the power contained in the Act. Then the last case upon the subject is *In re Daniels* (3), before Swinfen Eady J., in which there was no power in the settlement to grant leases of unopened mines. He there held that where there was no such power contained in the settlement, and only a mere direction to pay the rents and profits of the settled estates to the tenant for life, that did not amount to a "contrary intention" within s. 11 where a lease of an unopened mine had been granted under the power contained in the Act of 1882. If I may say so, that was the necessary conclusion. It seems to me that the settlor there had no intention of conferring the power of granting mining leases in any way.

In the case before me the testator has provided for the application of the rents and royalties arising under mining leases, but it is quite true that the rents and profits arising under the mining leases that have been granted are not directly controlled by the provisions of the settlement, because the leases are not granted

(1) [1894] 1 Ch. 177. (2) 24 Ch. D. 129.
(3) [1912] 2 Ch. 90.

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under the power contained therein but under the power contained in the Act. It seems to me, however, the right conclusion is that arrived at in *In re Bagot's Settlement* (1), and which was also arrived at, although I think it was not necessary for the decision of the case, in *In re Duke of Newcastle's Estates.*(2) I hold therefore that there is a "contrary intention" expressed in this settlement, and that the rents and royalties under the mining leases go as part of the rents and profits controlled by the provisions of the settlement and do not go in accordance with s. 11 of the Act of 1882.

Solicitors: *Wood, Bigg & Nash, for James & Snow, Exeter; Woodcock Ryland & Parker; Withers & Co.*

H. L. F.

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In re SMITH.

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[1912 S. 2410.]

Will—Construction — Charge of Legacies and Debts on Specific Realty and Personalty in Foreign Country — Mixed Fund — Non-exoneration of Residuary Personalty—Rule of Construction—Order of Administration.

By his will made in 1905 the testator, after appointing executors and trustees, gave certain legacies free of duty, and subject to the payment of the said legacies and duties, and his funeral and testamentary expenses and debts, he devised and bequeathed all his real estate situate in the Argentine Republic, including therein chattels real and land of whatsoever nature, together with farming stock, crops, and household and farming effects and consumable stores and provisions in or about his real estate in the Argentine, unto his trustees upon trust to sell, and after payment of the expenses of such sale to pay the residue to the children of his two brothers in equal shares; and the testator devised and bequeathed the residue of his real and personal estate to his trustees in trust for his nephew, the plaintiff.

The testator died in 1910, domiciled in England, and on a question being raised on summons whether the testator had charged his real and personal estate in the Argentine with the payment of legacies, duties, and debts, in exoneration of his residuary estate:—

Held, (i.) that, on the true construction of the will, the charge was confined in its operation to the Argentine property;

(ii.) that the rule of construction which required that there must be

(1) [1894] 1 Ch. 177. (2) 24 Ch. D. 129.

found in the will an intention not only to charge the realty, but to discharge the personalty, applied to realty situate outside the jurisdiction;

(iii.) that the fund charged was not a true mixed fund within the authority of *Roberts* v. *Walker* (1830) 1 Russ. & My. 752, inasmuch as there was no trust for conversion of the whole real and personal estate for the purposes of satisfying the charge.

Held, therefore, that the devise of real estate in the Argentine charged with these payments made it an auxiliary fund to the personalty, but did not operate to exonerate the personalty from its primary liability.

But *held* that, as the rule of construction applicable to realty had no application to the personalty, the concurrent charge of legacies and debts on the specifically bequeathed personalty did exonerate the residuary personalty from its primary liability.

ADJOURNED SUMMONS.

By his will made in 1905 Patrick Crawford Smith, of 100, Victoria Street, in the city of London, appointed his brother, the defendant Henry Smith, of the Argentine Republic, and four other gentlemen to be the executors and trustees of his will, and, after giving them legacies free of duty for their trouble in acting, he gave to Madame Marie Julie Pattay a legacy of 3000*l.* free of duty, and subject to the payment of the said legacies and duty, and his funeral and testamentary expenses and debts, he gave, devised, and bequeathed all his real estate situate in the Argentine Republic, including therein chattels real and land of whatsoever nature or title the same might be, together with all his farming stock, both live and dead, growing and other crops, and all his household and farming effects and consumable stores and provisions whatsoever, which at the time of his death should be in or about any of the said real estate, chattels real, or land, situated in the Argentine Republic, unto his trustees, their heirs, executors, administrators, and assigns, according to the nature and tenure of the same premises respectively, upon trust to sell, convert, and get in the same, with power to postpone such sale and conversion indefinitely without being responsible for loss, and, after payment of the expenses of such sale and conversion, to pay the residue of the proceeds thereof unto the children of his brothers Robert Brown Smith and Thomas Smith in equal shares absolutely. The testator also directed his trustees to carry on his farming and other business until the sale of the real and personal estate, and he devised and

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bequeathed all the residue of his real and personal estate unto his trustees in trust for his nephew, the plaintiff Patrick Smith, son of his brother Frederick Crawford Smith.

The testator died on December 21, 1910, domiciled in England, and the defendant Henry Smith was the surviving trustee of the will. On January 30, 1912, Henry Smith appointed the Public Trustee to be sole trustee of the will in place of himself so far as regarded the residuary estate directed to be held in trust for Patrick Smith, who was an infant. The defendants Charles Crawford Smith and William Harold Smith were two of the six children of the testator's brother Thomas Smith, and were of age and resident in the Argentine. The four other children of Thomas Smith were also made defendants, one of them being resident in the Argentine, and three, who were infants, were in Australia. The remaining two defendants were the infant children of the testator's brother Robert Brown Smith, and were in New Zealand. The estate in the Argentine was estimated to be worth 150,000*l.* The estate in England appeared from a balance-sheet of December 21, 1911, to amount to 17,559*l.* 5*s.* 9*d.*, out of which duties, debts, legacies, and expenses to the amount of 14,798*l.* 11*s.* 1*d.* had been paid, leaving a balance of 2760*l.* 14*s.* 8*d.* A sum of 1173*l.* 15*s.* 1*d.* paid in respect of estate duty on the estimated value of the testator's farming stock in the Argentine had been refunded to the Public Trustee by the Commissioners of Inland Revenue.

On July 20, 1912, an originating summons was taken out by Patrick Smith (suing by Frederick Crawford Smith, his father and next friend) asking whether, upon the true construction of the testator's will, he had charged his real estate in the Argentine Republic, and the stocks, crops, and effects pertaining thereto, or the proceeds of sale thereof, with the payment of the legacies bequeathed by the will and of the duties thereon, and of the testator's funeral and testamentary expenses and debts, in exoneration of the residue of his real and personal estate; and that the real and personal estate of the testator might be administered by the Court.

Jessel, K.C., and *T. T. Methold*, for the plaintiff, the residuary legatee. We submit that the rule, that when there is a charge of

debts and legacies upon real estate there must also be an intention to discharge the personal estate in order to free it from the primary liability to pay debts, does not apply here, for two reasons—first, because there is a mixed fund charged with these payments, and secondly, because the real estate which is charged is in a foreign country. The charge is limited here to the Argentine assets. The general rule is stated in *Bootle* v. *Blundell* (1), and it cannot be contended here that there is an express exoneration of the general personalty. But the rule is arbitrary and artificial, as was stated by Lord Halsbury L.C. in *Kilford* v. *Blaney* (2), and will not be extended by the Court. No decision can be found where the rule has been applied to a charge upon a mixed fund of real and personal property. In *Kilford* v. *Blaney* (2) there was a sufficient intention manifested by the testator that the general personal estate should be exonerated.

The general rule as to mixed funds is to be found in the case of *Bellairs* v. *Bellairs* (3), and it would seem that in such cases the Court will follow the rules as to personal estate. Here the domicil being English, the construction of the will is one for this Court, and it is clear that there was personal property in the Argentine as well as real. Where there is a mixed fund specifically charged with payment of debts and legacies it is not necessary that the residuary personalty should be expressly exonerated: *Roberts* v. *Walker* (4); *Attorney-General* v. *Southgate.* (5) On the authorities, it is also clear that if specific personalty is bequeathed so as to be charged with the payment of debts and legacies, that exonerates the residuary personal estate from its primary liability to satisfy them: *Browne* v. *Groombridge* (6); *Choat* v. *Yeats* (7); *Phillips* v. *Eastwood* (8); *Webb* v. *De Beauvoisin.* (9)

Secondly, as to the land being abroad, the liability must be determined by Argentine law: *Harrison* v. *Harrison.* (10) The lex loci is applicable.

(1) (1815) 1 Mer. 193.
(2) (1885) 31 Ch. D. 56, 61.
(3) (1874) L. R. 18 Eq. 510.
(4) 1 Russ. & My. 752.
(5) (1841) 12 Sim. 77.
(6) (1819) 4 Madd. 495.
(7) (1819) 1 Jac. & W. 102.
(8) (1835) Ll. & G. t. Sug. 270.
(9) (1862) 31 Beav. 573.
(10) (1873) L. R. 8 Ch. 342.

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H. Asquith, for the Public Trustee, supported the plaintiff's argument.

Cozens-Hardy, K.C., and *F. S. Cooper*, for Henry Smith, the first defendant, and two of the beneficiaries. There is nothing to take this case out of the ordinary rule, which is well settled. We admit that the charge is exclusively on the property in the Argentine. *In re Banks* (1) shews that the personal estate is primarily liable for the payment of all debts in the absence of special exoneration, or necessary implication.

The cases cited on the other side are either distinguishable, or relate only to charges on personalty. Here it is not really a true mixed fund. There is no trust for the sale and conversion of the whole real and personal estate and payment of the debts and legacies out of the proceeds. There is only a gift of the property subject to the payment of debts, &c. It is not like *Roberts* v. *Walker* (2), which was an instance of a trust for sale of a mixed fund and for payment of debts out of the mixed fund. There is no case precisely in point, but the distinction between the present case and *Roberts* v. *Walker* (2) appears from the decisions in *Boughton* v. *Boughton* (3) and *Tench* v. *Cheese*. (4) There must be a direction for sale and payment of the debts and legacies out of the common fund of realty and personalty in order to make it a true mixed fund. In the order of administration of assets laid down in Theobald on Wills, 7th ed. pp. 828—832, foreign land comes last, inasmuch as it would not be liable for the payment of debts unless by the lex loci rei sitæ : *Harrison* v. *Harrison*. (5)

H. T. Method, for other infant beneficiaries, adopted the arguments of Cozens-Hardy, K.C., and further submitted that the clause in the will imposing the charge of the legacies, duties, and debts was not confined to the Argentine assets alone, but applied to the whole of the testator's property. The order of the assets for the payment of legacies and debts was not altered by the charge.

Jessel, K.C., in reply, referred to *Allan* v. *Gott* (6), where *Tench* v. *Cheese* (4) was commented upon.

(1) [1905] 1 Ch. 547.
(2) 1 Russ. & My. 752.
(3) (1848) 1 H. L. C. 406.
(4) (1855) 6 D. M. & G. 453.
(5) L. R. 8 Ch. 342.
(6) (1872) L. R. 7 Ch. 439.

EVE J. The question raised by the summons is whether the testator has charged his real estate in the Argentine Republic, and the stocks, crops, and effects pertaining thereto, or the proceeds of sale thereof, with the payment of the legacies bequeathed by his will, and the duties thereon, and his funeral and testamentary expenses and debts, in exoneration of his residuary estate. Mr. H. T. Methold has argued that the clause in the will which is said to impose the charge on the Argentine assets is not confined in its application to the Argentine property alone, but refers to the whole of the testator's estate, and is more in the nature of a reminder that the residue is only ascertainable after payment of the legacies, duties, funeral and testamentary expenses, and debts. For some time I was inclined to adopt that view, but on further consideration I think to do so would be to put a strained construction on the will, and that the true construction of the clause is that contended for by Mr. Jessel and Mr. T. T. Methold, and against which Mr. Cozens-Hardy and Mr. Cooper did not see their way to argue, that is to say, that it is confined in its operation to the Argentine property. On that footing the testator clearly subjects the Argentine property real and personal to a charge for legacies, duties, funeral and testamentary expenses, and debts, but the material question is whether it is a charge exonerating the residuary personalty from its primary liability to make those payments.

The rule of construction which requires that something must be found in the will to shew that the testator intended not only to charge the realty but to discharge the personalty—a rule which is criticized with great force by Lord Halsbury L.C. in *Kilford* v. *Blaney* (1)—is too well settled to be capable of any question at this time of day, and having regard to that rule, if I were dealing here with a simple devise of real estate in England subjected to a charge in the terms of this will, I do not think I could possibly hold, on the authorities, that this testator has manifested an intention to exonerate the personal estate. But it is urged that this is not a case for the application of that rule, first, because the realty is not land in England but foreign land, and, secondly, because it is not a simple devise of real estate charged

(1) 31 Ch. D. 56.

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with the payments, but is in effect the creation of a mixed fund out of which the payments are to be made. In support of the argument that the rule does not apply to foreign land it is urged that it owes its origin to the excessive affection displayed towards realty in times past in this country, and there being no reason why foreign land should excite the same sentiments there are no valid grounds for extending in favour of foreign land a rule founded on considerations not applicable thereto. I do not think the argument is altogether sound. It may be that the attitude of the Courts towards real estate may have contributed to the establishment of the rule, but in the judgment of James L.J. in *Allan* v. *Gott* (1) there are, I think, to be found other cogent reasons why personal estate is the primary fund for payment of debts and to a lesser degree of legacies. As the Lord Justice there points out, the debts of a deceased person are a charge upon his personal estate wholly irrespective of and paramount to any will which he may express with regard to them ; the executor is bound to pay the creditor, and the creditor is entitled to be paid out of those personal assets immediately or as soon as it can be done in the course of administration ; and therefore it is that the personal estate is the primary fund. The mere charging of the real estate with payment of debts and legacies makes the realty an auxiliary fund, secondarily liable only, and cannot effect any interference with the ordinary rule for the application of assets. To bring about this last result you must find not only an expression of oneration of the real estate, but a sufficient expression of exoneration of the personal estate. This reasoning appears to me to cut away any foundation for the suggestion that a distinction can be drawn between land within and without the jurisdiction, and in my opinion the fact that the land in question in this case is situate outside the jurisdiction, in the Argentine Republic, is no valid reason for excluding the operation of the rule.

Then comes the question, Is this a mixed fund? If it is, the rule, says the residuary legatee, has no application ; the rules governing mixed funds—that is, the proceeds of realty and personalty directed to be converted and thrown together as an

(1) L. R. 7 Ch. 439.

entire fund—are very different from those governing simple funds arising from one or the other kind of property, and a mixed fund is, according to modern practice, governed by the rules of personalty: see per Jessel M.R. in *Bellairs* v. *Bellairs*. (1) This is not disputed, but it is denied that there is any mixed fund here. Well, is there? In one sense no doubt the Argentine real and personal estate are mixed, they are given together to the same persons and are all subjected to the same charge, but the important point is that there is no trust for conversion for the purposes of satisfying the charge. The subject-matter of the trust for conversion is not the whole real and personal estate, but only so much of it as survives after the discharge of the payments. It is not, in my opinion, a true mixed fund within the authority of *Roberts* v. *Walker* (2) and the other cases dealing with mixed funds which have been cited to me.

It comes therefore to this, that in my opinion no sufficient ground has been shewn for not applying the rule of construction I have already stated. I have a devise of real estate charged with these payments in terms which make it an auxiliary fund to the personalty but do not operate to exonerate the personalty from its primary liability. Concurrently I have a bequest of personal estate charged in like manner with these same payments. The rule applicable to the realty has no application to the personalty, as is shewn by the series of authorities cited by Mr. T. T. Methold. A charge of legacies and debts on specifically bequeathed personalty exonerates the residuary personalty from its primary liability. Why should not full effect be given to this distinction in the present case? I think it ought to be, and that I ought to hold that upon the true construction of his will the testator has not charged his real estate in the Argentine Republic, but has charged his personal estate—if any—comprised in this bequest with the payment of the legacies, duties, funeral and testamentary expenses, and debts in exoneration of his residuary personal estate. As all parties agree in asking for it, there will be an order for general administration and an appropriate inquiry for ascertaining what

(1) L. R. 18 Eq. 510, 516. (2) 1 Russ. & My. 752.

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personal estate, if any, was comprised in the bequest, with liberty to apply.

Solicitors: *R. S. Taylor, Son & Humbert; Herbert Toomer, for Hirst & Capes, Harrogate.*

G. M.

[1913] 2 Ch. 224. *In re* FRASER. | *Distinguished. In re* PLAYFAIR, DECD. [1951] 1 Ch. 4

SARGANT J. 1913 *April* 7, 8.

In re FRASER.

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[1912 F. 893.]

Settlement — Construction — Hotchpot Clause — Settled Funds — Covenant to Settle After-acquired Property — Trusts by Reference.

By a marriage settlement made in 1847, funds belonging to the husband, called "the firstly mentioned trust fund," and a fund belonging to the wife's father, called "the secondly mentioned trust fund," were settled, subject to life interests in the husband and wife, in trust for such children of the marriage as the husband and wife should jointly appoint, and in default as the wife should appoint, and as to the unappointed part, in trust for the children in equal shares, the sons taking vested interests at twenty-one and the daughters at twenty-one or marriage. Then followed a clause providing that no child who should "take any part of the said trust funds" under any appointment made by the husband and wife or the survivor of them under the powers thereinbefore given should take any part of "the said trust funds by virtue of the trusts hereinbefore declared in default of appointment" without bringing his or her share into hotchpot. The settlement also contained a covenant to settle the wife's after-acquired property, which was to be held "upon and for such of the said trusts, intents, and purposes, and under and subject to such of the powers, provisoes and agreements as are herein declared, expressed or contained of and concerning the secondly mentioned trust fund, and the income thereof, as shall for the time being be subsisting or capable of being acted upon and exercised." There were seven children of the marriage, and the husband and wife appointed the whole of "the firstly mentioned trust fund" and "the secondly mentioned trust fund" in favour of five of the children. Subsequently two legacies to the wife came in and were caught by the after-acquired property clause. The husband and wife died without making any further appointment:—

Held, that the two after-acquired legacies formed an accretion to the two original funds and that the five appointees of those funds could not

share in the legacies without bringing the shares appointed to them into hotchpot.

In re Cavendish [1912] 1 Ch. 794, distinguished.

Observations on *In re Perkins* (1892) 67 L. T. 743; 41 W. R. 170; *In re North* (1897) 76 L. T. 186; and *In re Marquis of Bristol* [1897] 1 Ch. 946.

By a settlement dated April 26, 1847, and made on the marriage, shortly afterwards solemnized, of the Reverend Duncan Fraser and Mary Elizabeth Parker, after reciting that the husband had agreed to settle 1500*l.* (part of a sum secured by mortgage), 850*l.* (secured upon a mortgage), 751*l.* 8*s.* 11*d.* Reduced 3 per cent. Annuities, and twenty shares in a company, and had transferred these things to the trustees of the settlement; and reciting that Charles George Parker (the father of the wife) had purchased in the names of the trustees the sum of 2564*l.* 2*s.* 1*d.* Bank Stock and agreed to settle it; and reciting that "upon the treaty for the said intended marriage it was agreed that all the real and personal estate to which the said Mary Elizabeth Parker, or she and the said Duncan Fraser, or the said Duncan Fraser in her right, shall during the said intended coverture become entitled, either in possession, reversion, remainder, or expectancy, or otherwise howsoever, shall be settled upon and for such trusts and purposes, and subject to such powers, provisoes, and declarations as are hereinafter expressed or declared thereof," it was witnessed that after the solemnization of the marriage, the trustees should hold the two mortgage sums, the Reduced 3 per cent. Annuities, and the twenty shares, upon trust during the joint lives of the husband and wife to pay the income thereof to the husband during his life, and after his decease to the wife (if living) during her life, and should hold the Bank Stock settled by the wife's father upon trust, during the joint lives of the husband and wife, to pay the income thereof to the wife for her separate use, without power of anticipation, and after the death of either of them to pay such income to the survivor. And as to the two mortgage sums, the Reduced 3 per cent. Annuities, and the twenty shares, "hereinafter denominated 'the firstly mentioned trust fund,'" and the Bank Stock, "hereinafter denominated 'the secondly mentioned trust

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fund,'" from and after the decease of the survivor of the husband and wife, in trust for such of the children of the marriage as the husband and wife should by deed jointly appoint, and in default of such joint appointment, or so far as the same, if any, should not extend, then as the survivor of the husband and wife should by deed or will appoint, and in default of such appointment or so far as the same, if any, should not extend, "in trust for the child (if only one) or all the children (if more than one) of the said intended marriage who being a son or sons shall live to attain the age of twenty-one years, or shall die under that age leaving issue at his or their death or respective deaths, and who, being a daughter or daughters, shall live to attain that age or shall marry under that age, and if more than one in equal shares, such portion or portions to be an interest vested in the child or children for whom the same is or are intended to be provided, as to a son or sons on his or their respectively attaining the said age or dying under such age leaving issue as aforesaid, and as to a daughter or daughters on her or their respectively attaining the said age or marrying, whichever shall first happen."

After providing for what was to happen in default of children and issue the settlement contained a hotchpot clause in the following words: "Provided always, and it is hereby agreed and declared, that no child of the said intended marriage who shall take any part of the said trust funds under any appointment made by the said Duncan Fraser and Mary Elizabeth Parker, or by the survivor of them, in pursuance of the powers hereinbefore given to them and to the survivor of them, shall take any part or share of the said trust funds by virtue of the trusts hereinbefore declared in default of appointment without bringing his, her, or their appointed share or shares into hotchpot and accounting for the same accordingly, unless by any such appointment a contrary intention shall be declared." After this followed advancement and maintenance clauses, and the settlement then continued as follows: "And this indenture further witnesseth that, in consideration of the said intended marriage, and in pursuance of the said agreement in this behalf, it is hereby further covenanted, declared and agreed, by and between

the said Duncan Fraser and Mary Elizabeth Parker, and each of them doth hereby . . . . covenant . . . . with . . . . the other of them . . . . and they do hereby . . . . covenant" with the trustees "that in case the said intended marriage shall take effect they the said Duncan Fraser and Mary Elizabeth Parker and all other necessary parties shall and will, from time to time, (at the expense of the property to be settled) make, do, and execute, or join and concur in making, doing and executing all such acts, deeds, conveyances, surrenders, assignments and assurances in the law whatsoever as shall be proper or advised by counsel for well and effectually conveying, surrendering, assigning and assuring unto the" trustees "all and singular the messuages, lands, tenements, hereditaments, monies, stocks, goods, chattels, and other real and personal estate whatsoever which at any time or times during the said intended marriage the said Mary Elizabeth Parker, or she and the said Duncan Fraser in her right, or any person or persons in trust for her, shall become seised possessed of or entitled to, in possession, reversion, remainder, expectancy, contingency, or in any manner howsoever, Upon and for the trusts and purposes following." And it was thereby declared that the trustees should stand seised and possessed of such property upon trust to sell and convert the same as therein mentioned, with power to grant leases for not exceeding twenty-one years, and to hold the proceeds, and the investments for the time being representing the same and the income thereof, "Upon and for such of the said trusts, intents and purposes, and under and subject to such of the powers, provisoes, agreements, and declarations as are herein declared, expressed or contained of and concerning the secondly mentioned trust fund and the income thereof, as shall for the time being be subsisting or capable of being acted upon and exercised."

The seven children of the marriage were Mary Cecilia Fraser (who married one Creagh), George Duncan Fraser, Ada Fraser, Isabella Mary Fraser (who married one Ind), Agnes Maude Fraser, Louisa Etheldred Fraser (who married one Jessel), and Herbert Charles Fraser. George Duncan Fraser survived his father, but died before the summons mentioned below was heard.

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Mary Cecilia was married in June, 1870, and on this occasion her father and mother, under the power given to them jointly by the settlement, appointed the sum of 2000*l.* in her favour.

Isabella Mary was married in January, 1879, and on this occasion her father and mother appointed the sum of 2000*l.* in her favour.

By a deed poll, dated March 9, 1899, Duncan Fraser and his wife appointed that, from and after the decease of the survivor of them, the residue, unappointed by the deeds of 1870 and 1879, of the funds settled respectively by Duncan Fraser and his wife's father should remain and be upon trust for each of the five following children, namely, Mary Cecilia Creagh, Ada Fraser, Agnes Maude Fraser, Isabella Mary Ind, and Herbert Charles Fraser, as should be living at the death of such survivor for their absolute use in equal shares, but so nevertheless that neither Mary Cecilia Creagh nor Isabella Mary Ind should be entitled to any share of such residue without bringing the 2000*l.* previously appointed to her into hotchpot and accounting for the same accordingly.

Mary Elizabeth Fraser, the mother of the children, in 1903 became entitled to a legacy of 11,339*l.*, which, under the after-acquired property clause of the settlement, became subject to the settlement trusts. She died on February 20, 1906, and her estate shortly afterwards became entitled to a legacy of 1985*l.*, which also became subject to the settlement trusts.

Duncan Fraser died on January 17, 1912.

Warrington J. by an order made on January 23, 1913, declared that the deed poll of March 9, 1899, did not operate as a good appointment of either of the legacies of 11,339*l.* and 1985*l.*, and that both sums must be distributed as in default of appointment, namely, in sevenths.

An originating summons was issued raising the question whether, by reason of the hotchpot clause in the settlement of 1847, the five children in whose favour the appointment of 1899 was made must bring into hotchpot and account for the shares of the originally settled property then appointed to them before sharing in the distribution of the after-acquired sums of 11,339*l.*

and 1985*l*. The summons was adjourned into Court and heard by Sargant J.

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W. R. Sheldon, for the applicants, stated the facts and the question for decision.

A. Grant, K.C., and *Howard Wright*, for Ada Fraser and Agnes Maude Fraser. These persons are two of the appointees under the deed poll of 1899, and the contention on their behalf is that they are not bound to bring into hotchpot the shares thereby appointed to them. The present case cannot be distinguished from the decision of Parker J. in *In re Cavendish*. (1) There there was a hotchpot clause relating to the fund originally settled by the wife and an agreement to settle after-acquired property. The original fund was all appointed by the husband and wife to one of their four children, and the husband and wife both died without making any further appointment. Other property was brought in under the after-acquired property clause, and it was held that this and the original fund were distinct funds, and that the appointee was not bound to bring the appointed fund into hotchpot in order to share in the after-acquired property. Here there are three funds, namely, the husband's fund, the wife's fund, and the after-acquired property. The settlement first states separately the trusts of the husband's and wife's funds, and then blends them as one fund, alone subject to the hotchpot clause, subsequently dealing with the after-acquired property as a distinct fund. The expression "the said trust funds" in the hotchpot clause means the funds already settled. *In re Cavendish* (1) was followed by Neville J. in *In re Wood* (2), which was the case of a will.

[They were stopped by the Court.]

Martelli, K.C., and *Hodge*, for Louisa E. Jessel, and *Romer, K.C.*, and *Ribton*, for the representatives of George Duncan Fraser. Neither Mrs. Jessel nor G. D. Fraser took under the appointment of 1899, and it is contended for them that the hotchpot clause applies to the after-acquired property in the sense that the appointees under the deed of 1899 must bring in their shares before participating in the after-acquired sums. *In re*

(1) [1912] 1 Ch. 794. (2) [1913] 1 Ch. 303.

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Cavendish (1) is distinguishable from the present case. In that case Parker J. concluded that a certain clause in the settlement shewed that the parties considered that one fund was a different fund from the funds comprised in the agreement to settle after-acquired property, and he followed the decision of Romer J. in *In re Marquis of Bristol* (2) rather than that of North J. in *In re Perkins.* (3) [They also referred to *Hindle* v. *Taylor* (4) and *In re Beaumont.* (5)]

A. Grant, K.C., in reply. *In re Perkins* (3) is the only case which decides that the funds are to be treated as amalgamated for the purposes of the hotchpot clause, and as against that there are the three cases which have been referred to. *In re Perkins* (3) was discussed by Stirling J. in *In re North.* (6) The principle enunciated in *In re Cavendish* (1) and *In re Wood* (7) is that the application of the hotchpot clause to both funds involves an alteration of the trusts of the original fund. The Court only leans towards a blending of trust funds in order to prevent a multiplication of charges. [He also referred to Davidson's Conveyancing, 3rd ed. vol. iii. pt. ii. p. 728.]

G. R. Northcote, for Mary Cecilia Creagh, referred to Key and Elphinstone's Conveyancing, 4th ed. vol. ii. pp. 485, 519.

L. W. Byrne, for the trustees of the marriage settlement of Isabella Mary Ind, referred to Davidson's Concise Precedents, 16th ed. p. 469.

SARGANT J. This is a difficult and important case, and one which has more or less general application; but it has been very fully and well argued before me, and I do not think that anything would be gained by my reserving judgment, particularly as it seems to me to be a case which is likely to go higher, both because of its general importance and because of the considerable amount of the trust fund which is involved.

The question is one as to the operation of a hotchpot clause with reference to after-acquired property of the wife. The settlement is one of an ordinary character, except that it is rather fuller than is usual, especially at the present day. It is in fact

(1) [1912] 1 Ch. 794.
(2) [1897] 1 Ch. 946.
(3) 67 L. T. 743; 41 W. R. 170.
(4) (1855) 5 D. M. & G. 577.
(5) [1913] 1 Ch. 325.
(6) 76 L. T. 186.
(7) [1913] 1 Ch. 303.

a settlement executed in the year 1847, and by it there were settled, first, the husband's trust fund, which is referred to in the settlement as the "firstly mentioned trust fund," and, secondly, a specific fund of the wife, referred to as "the secondly mentioned trust fund," and by the settlement, after the usual life interests, both these two specific funds were given upon the usual trusts for children of the marriage, as the parents should jointly appoint, or as the survivor should appoint, and in default for the children on attaining twenty-one or marrying, and so on.

The settlement then contains a hotchpot clause in these terms: [His Lordship read the clause and continued.] That clause clearly applies, so far, only to the two specifically settled trust funds. Then, by a further witnessing part an agreement is entered into by which the after-acquired property—I do not think it is the further property; I think it is only the after-acquired property—of the wife is to be brought into settlement, and by that witnessing part the property is subjected to a trust for sale. There is an interim power of leasing, and there is a power of investment, and then the proceeds of sale and the investments are settled in this way: "And it is hereby further agreed and declared by and between the said parties hereto that the trustees and trustee for the time being of these presents shall stand and be possessed of and interested in all and singular the said last mentioned trust monies," and so on, and the income thereof, "upon and for such of the said trusts, intents and purposes, and under and subject to such of the powers, provisoes, agreements and declarations as are herein declared, expressed or contained of and concerning the secondly mentioned trust fund and the income thereof, as shall for the time being be subsisting or capable of being acted upon and exercised." And then there are a number of usual provisions, including another investment clause which would apply clearly to the whole of the trust funds, I think, including certainly the proceeds of sale of the after-acquired property. I am not quite sure about that, but I do not think that it is really of importance. Then there is power to buy land, and there is power to lease land so bought, which is slightly different, as the second investment clause is slightly different, from the prior power to lease land.

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Now, under that settlement what has happened is this. There have been seven children of the marriage, and appointments have been made of "the firstly mentioned trust fund" and "the secondly mentioned trust fund" amongst five of them, but two of the children have had no appointments made to them. Two considerable sums have fallen in—one being a sum of about 1900*l.* and the other a sum of over 10,000*l.*—and have been caught by the covenant to settle after-acquired property; and the question arises whether, in the distribution of these sums, the appointments which have been made of the two specifically settled trust funds have to be taken into account.

In my judgment, these two appointments must be taken into account. The weight of authority appears at first sight to be against the conclusion at which I have arrived, but I do not think that this is really so when the decisions are carefully examined. There are five or six cases which are of importance. First, there is the case of *In re Perkins* (1), which was decided by North J. Then come two cases which were decided almost contemporaneously, and without the judge in either case knowing of the decision in the other. These are *In re North* (2), decided by Stirling J., as he then was, and *In re Marquis of Bristol* (3), decided by Romer J., as he then was. Next, there are the case decided by Parker J., as he then was, of *In re Cavendish* (4), and the still more recent case of *In re Wood* (5), decided by Neville J. There are also certain observations that are in point, made by Farwell L.J. in *In re Beaumont.* (6)

Looking at all those cases carefully, I will endeavour to state what is a fair inference to be derived from them. It seems to me that the question really turns upon this: Is the second set of words which settles the additional fund really a separate settlement of the additional fund upon the like trusts as the first or original fund, the words being merely words of reference so as to operate by way of compendious introduction of the earlier trusts, or does the second set of words operate as an amalgamation of the second fund with the first fund so as to make it an

(1) 67 L. T. 743; 41 W. R. 170.
(2) 76 L. T. 186, 187.
(3) [1897] 1 Ch. 946.
(4) [1912] 1 Ch. 794.
(5) [1913] 1 Ch. 303.
(6) [1913] 1 Ch. 325.

augmentation of or accretion to the first fund? In the former case prima facie it would seem proper to introduce into the trusts of the second fund a hotchpot clause which was limited to that fund, just as the original hotchpot clause was limited to the original fund. But in the latter case it prima facie seems proper to treat the whole of the trusts of the original fund, including the hotchpot clause, as being applicable to the amalgamated or augmented fund, by virtue of the amalgamation, or augmentation, or accretion that has been directed.

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In *In re Perkins* (1) North J. arrived at the conclusion, as a matter of construction of the particular document in that case, that the two extra funds that were dealt with, secondly and thirdly, by the will were made an accretion to the first fund. He says (2): "On the whole, therefore, I think that he has not made three separate settlements of these different funds, but has given the second and third funds to the trustees of the first as an accretion to the fund already held by them, and has declared one trust of the whole. The hotchpot clause therefore applies to all three funds." The words of the hotchpot clause were necessarily extended to the accretion, though in the first instance they applied only to the first fund.

That case was considered in *In re North* (3) by Stirling J., who points out that you must not lay too much stress on the word "same" or the word "similar," and also that the decision of North J. really turns on the fact that he treated the second and third funds as being an accretion to the first fund, because Stirling J. says at the end of his judgment: "Here"—as distinguished from the case before North J.—"there is no context which would enable me to say that by the use of the word 'same' an accretion of the fund was intended." He clearly was referring there to the use of the word "accretion" in the judgment of North J., and I think it is perfectly clear that he indicates that if he had come to the conclusion on construction in the case of *In re North* (3) which North J. had in *In re Perkins* (1), he would have held that the hotchpot clause

(1) 67 L. T. 743; 41 W. R. 170.
(2) 67 L. T. 747.
(3) 76 L. T. 186.

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extended to the whole fund including the accretion, that is to say, the original fund plus the accretion.

Then comes the case of *In re Marquis of Bristol* (1), where, again, the learned judge held that the hotchpot clause did not extend to both trust funds; but he came to that conclusion quite clearly on this ground, that the second fund was not amalgamated with, or made an accretion to, the first fund. He points out that there are great differences both in the source from which the property comes and in the destination of the property, as was made apparent by the instrument in question. And then he says: "Now, in the case before me the trusts with reference to the 5000*l.*,"—that is, the second fund—"so far as material, are not the same as those upon which the 13,000*l.* was to be held, but 'such and the same or the like' trusts and subject to 'the same or like powers, provisoes and agreements.' As I have already said, I cannot gather from this deed that there was any intention that, for the purpose of the settlement, the two funds were to be treated as one fund. So that the case before North J. does not apply to the case now before me. Really the case now before me is much more like the case of two funds declared by two separate deeds where the second deed declares the trusts of the second fund by reference to the first." So that there again, on the question of construction, the learned judge came to the conclusion that there was no intention to amalgamate the two funds.

Now I come to *In re Cavendish* (2), and that is the case which has caused me the greatest difficulty, because it is one in which an after-acquired property clause was dealt with, and the question was whether the hotchpot clause, which was in the first instance expressed with reference to the specifically settled fund, applied also to the after-acquired property. There Parker J. held that it did not, but I think that when that decision comes to be carefully examined, notwithstanding one or two sentences that might point to a different conclusion, he really is coming to the conclusion that the fund caught by the covenant to settle after-acquired property was regarded as another fund, a separate fund from the fund originally settled by the wife, and

(1) [1897] 1 Ch. 946, 949. (2) [1912] 1 Ch. 794.

was not to be treated as being an accretion to or augmentation of the original fund; and he came to that conclusion upon the special arrangements that were made with regard to the sum of 15,000*l.* under the trusts of the original settlement. The whole of the observations of the learned judge, from about two-thirds of the way down p. 804 of the report in the *Law Reports* to the end of p. 805, are directed to shewing that, as a question of interpretation, the case came within the principles laid down in *In re Marquis of Bristol* (1), and really was a case analogous to *In re Marquis of Bristol* (1), and there are some passages in other parts of the judgment which point to the same conclusion. I do not think that Parker J. intended to lay down as a broad proposition—because this is a broad proposition which will have at some time or other to be considered—that, assuming you have a settlement by a wife of one fund only, but no settlement by the husband, and assuming that you have a covenant to settle after-acquired property on the trusts of the original fund, and a hotchpot clause which has been inserted before the covenant to settle after-acquired property and which in terms relates only to the fund specifically settled, it is prima facie to be taken that there are two funds, and that accordingly you have to introduce a separate hotchpot clause in the case of the after-acquired property.

I think that would be contrary to the general understanding of the profession, and I feel sure that in numberless cases, where funds have from time to time fallen in under after-acquired property clauses, there have been distributions of the original fund and the "accreted" fund—of course, I am using a word there which begs the question in my favour, so I will say the fund which comes in in that way—on the footing that the appointments which have been made of the original fund before the other funds fell in had to be taken into account under a hotchpot clause as against the total funds. I think there is this difficulty about the contrary view, namely, that if you have—as often happens and has happened in this case—two or three funds falling in at different times, and in each case the hotchpot clause has to be written out, together with the other trusts, as trusts

(1) [1897] 1 Ch. 946.

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introduced strictly by reference, you would have on each occasion to have a separate hotchpot clause for each separate fund as it fell in. You could not say that the original hotchpot clause applied to the original settled fund and that there was a second hotchpot clause applying to all the different items that from time to time came in. If you were to go on the principle of writing out the trusts originally inserted in the settlement with reference to each item as and when it came in, you would have to write them out on each separate occasion with a separate hotchpot clause. I do not think that would be in real accordance with the intention of persons who make a simple settlement of the kind I have indicated. In my opinion they are intending to treat any fund that may from time to time come in under such a clause as being an accretion to, and augmentation of, the original trust fund.

I ought here to mention the case of *In re Wood* (1), although I do not think it is of material assistance in the present case, because there the funds were settled on separate trusts as absolutely separate funds, and under those circumstances the learned judge came to the conclusion, from which I see no reason to differ, that they were funds with regard to which you had to treat the trusts as referential, and you had to write out, with regard to the second fund, the original trusts, and therefore had to write out a separate hotchpot clause.

Of course, with regard to referential trusts in general, where there are two instruments the case is very much stronger for writing out the clauses separately, for otherwise you might, by the second instrument, be altering the trusts of the fund declared by the first instrument. This is an argument which was used in *In re Marquis of Bristol* (2) and *In re Cavendish* (3), and on which great weight was very properly laid by Mr. Grant, namely, that by adopting the course which I am adopting you are altering the trusts already declared of the specifically settled trust fund with reference to something which occurs later on in the deed. I appreciate that that may be so if you once come to the conclusion that the second fund is a separate fund, yet even then

(1) [1913] 1 Ch. 303. (2) [1897] 1 Ch. 946.
(3) [1912] 1 Ch. 794.

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I can quite see that some exception might be taken to the argument, because it might very well be said: "You must take the instrument as a whole; you cannot be said to be altering the trusts in the earlier part of it by giving a construction to the trusts declared in the second part of it." But, apart from that when you once come to the conclusion—which is the conclusion I have come to in this case—that the settlement of the second fund is really an augmentation of or accretion to the first fund, you are not, I think, then altering the trusts of the hotchpot clause. All you are doing is to make the trusts of the hotchpot clause apply to the fund as augmented. If there is a true augmentation or accretion, the result must, I think, be that the addition to the fund must necessarily be subject to all the original trusts, including the original hotchpot clause.

Now the present is not quite the simple case with which I have been dealing, because here, under the hotchpot clause, the wife's original trust fund—the secondly mentioned trust fund—is amalgamated with the "firstly mentioned trust fund," the husband's trust fund. And I have not seen in any of the cases any but one of two principles adopted—either to treat the settlement of the second trust fund, namely, the after-acquired property, as being by way of accretion to the original trust fund, or to write out at length, with regard to the second trust fund, the trusts which are in the first instance made applicable to the first trust fund. Here the trusts which are made applicable to the "firstly mentioned trust fund" under the hotchpot clause are, that you are to take into account the appointments of the husband's fund—the "firstly mentioned trust fund"—as well as the appointments of the wife's fund—the "secondly mentioned trust fund." The words are "take any part of the said trust funds," and, reading that at length, it would be "any part of the firstly mentioned trust fund or of the secondly mentioned trust fund." Now, if you are to introduce those words into the settlement of the after-acquired property in the manner pointed out by Farwell L.J. in *In re Beaumont* (1)—he takes the words from the case of *Trew* v. *Perpetual Trustee Co.* (2), namely, where there is

(1) [1913] 1 Ch. 325. (2) [1895] A. C. 264, 267.

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a trust by reference, "the only safe course to adopt is to re-write the words declaring such trust, merely substituting the second fund or property for the first"—you must introduce into the settlement of the after-acquired property these words, "Provided always, and it is hereby agreed and declared, that no child of the said intended marriage who shall take any part of the firstly mentioned trust fund or of the trust funds brought into settlement under this clause," and then the direction would be made to bring into hotchpot, and so on. Mr. Grant, of course, objected to these words being brought in, but I do not see how, under the principle of referential trusts, you could omit the "firstly mentioned trust fund" as being one of the funds to be brought in under the hotchpot clause as applicable to the after-acquired property, and what the result of doing that would be I do not know in this case. Probably it would result in something between the contentions on either side. It certainly would create an enormous amount of confusion, and I think that in this instance there are even stronger reasons against adopting the referential construction than in the common-form case, which I have referred to, of a simple settlement of one trust fund of the wife and a covenant to settle after-acquired property.

In the result, I hold that the hotchpot clause must extend over the whole aggregate trust funds.

Solicitors for plaintiffs: *Frere, Cholmeley & Co.*

Solicitors for Ada Fraser and Agnes Maude Fraser: *Freshfields.*

Solicitors for Mrs. Jessel: *Brooks, Jenkins & Co.*

Solicitor for the representatives of George Duncan Fraser: *Adolphus G. Maskell.*

Solicitors for Mrs. Creagh and Mrs. Ind: *Bircham & Co.*

F. E.

AMBER SIZE AND CHEMICAL COMPANY, LIMITED *v.* MENZEL.

ASTBURY J.

1913

June 5, 6, 9.

[1912 A. 1297.]

Master and Servant—Trade Secret—Secret Process—Confidential Employment—Implied Obligation of Servant—Information as to Secret Process acquired during Employment—Information merely committed to Memory—Improper Use of Information—Action to Restrain—Secret Process not disclosed to Court—Power of Court to grant Injunction.

An ex-servant who has been confidentially employed in the manufacture of an article under a secret process is under an implied obligation to his late master not to use or disclose any knowledge or information as to that secret process acquired by him during his employment.

Morison v. *Moat* (1851) 9 Hare, 241; *Tuck & Sons* v. *Priester* (1887) 19 Q. B. D. 629; and *Robb* v. *Green* [1895] 2 Q. B. 1, 315, applied.

This principle applies to information acquired and retained in the servant's memory as well as to information committed to writing and existing in a tangible form.

The observations contra in *Merryweather* v. *Moore* [1892] 2 Ch. 518, 524; *Lamb* v. *Evans* [1893] 1 Ch. 218, 236; *Louis* v. *Smellie* [1895] W. N. 115; 73 L. T. 226, 228; and *Measures Brothers, Ld.* v. *Measures* [1910] 1 Ch. 336, 346, were not addressed to the case of a secret process.

Where the Court is satisfied that there is a secret process, and that the ex-servant has learnt a material part of it during his employment, and has made an improper use of the knowledge so obtained, it can grant an injunction, although the actual details of the secret process are not disclosed to the Court at the trial.

Newbery v. *James* (1817) 2 Mer. 446, 451, distinguished.

Witness Action.

In this action the plaintiffs claimed an injunction to restrain the defendant, a former employee, from using the whole or any material part of the plaintiffs' secret method or process of manufacture of size, the knowledge of which was acquired or obtained by him during his employment with the plaintiffs and from disclosing to any other person, company, or firm any information with respect thereto.

The defendant denied that the plaintiffs had any secret process at all, or that he knew it was supposed to be secret, or that he had acquired any material part of the supposed secret or any knowledge of a confidential nature during his employment.

ASTBURY J. 1913

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On these questions of fact the defendant failed, the result of the evidence being shortly as follows.

The plaintiffs manufactured size, called amber size, by a secret process comprising a secret mixture which was added to rosin size at the proper critical moment. The details of the secret process were not disclosed to the Court, but it was proved that the materials, proportions, and density of the mixture and the critical moment for adding it to the rosin size were all important parts of the secret process.

The defendant entered the plaintiffs' employ in 1906 and was at once told that the process was secret. He was subsequently instructed how and when to add the secret mixture to the rosin size, but he was not told the details of the mixture, which was prepared by a German employee in another room. During the course of his employment the defendant found out the materials of the mixture which he had to fetch from the mixing room, but he did not find out the proportions or density. He ascertained, however, that the plaintiffs used a very special form of hydrometer which was graduated from 33 to 35 on Beaumé's scale. It was also graduated as a Réaumur thermometer and used as such.

After leaving the plaintiffs' employment in 1912 the defendant entered the employ of a rival firm as size maker with the view of making size of the same quality as amber size. He obtained a hydrometer exactly similar to that of the plaintiffs, but found the results unsatisfactory, the fact being that the graduations of the plaintiffs' hydrometer scale were wrongly numbered in order to keep the real density secret. The defendant then applied for information to the original inventor Otto, who had sold the secret to the plaintiffs' predecessors, but, after communication with the plaintiffs, Otto declined to give any information.

The defendant did not therefore know the exact density of the plaintiffs' mixture, but as he knew the materials and that it was a strong solution the Court was not satisfied that he did not know it within small limits of error.

Hon. Frank Russell, K.C., and *Johnston Edwards*, for the plaintiffs. The defendant having learnt a material part of our

secret process during his confidential employment with us can be restrained from using or disclosing it: *Yovatt* v. *Winyard* (1); *Morison* v. *Moat.* (2)

Arthur Powell, K.C., and *H. M. Giveen*, for the defendant. In those cases the information was acquired surreptitiously and the defendant was properly restrained. But apart from express contract the Court cannot restrain the use of information openly acquired with the knowledge and concurrence of the employers: *Morison* v. *Moat* (3); *James* v. *James* (4); *Reuter's Telegram Co.* v. *Byron.* (5)

[ASTBURY J. Surely if the servant is told it is a secret process and is employed on that footing there is an implied obligation not to use or disclose it?]

Not unless he is expressly instructed in confidence or discovers the secret surreptitiously. In Kerr on Injunctions, 2nd ed. p. 440, the law is stated as follows: "Parties, however, in possession of a trade secret, who take a man into partnership, or into their employment, without making any stipulation as to the trade secret, and permit him to acquire a full knowledge of the secret, will be considered to have waived their right to preserve the secret for their separate benefit."

Hon. Frank Russell, K.C. The words "or into their employment" are omitted in the 4th edition, p. 425.

Arthur Powell, K.C. The law is more correctly stated in the 2nd edition. *James* v. *James* (4) was followed by Malins V.-C. in *Massam* v. *Thorley's Cattle Food Co.* (6) The head-note states that "Any person who has become acquainted with the process of manufacturing an article which is in general secret is entitled to manufacture it."

Again, the Court cannot restrain a man from using his knowledge. The jurisdiction is confined to the use of tangible materials such as written recipes, as in *Yovatt* v. *Winyard* (1) and *Morison* v. *Moat.* (2)

[ASTBURY J. Possession of tangible materials cannot be a

(1) (1820) 1 Jac. & W. 394.
(2) 9 Hare, 241.
(3) 9 Hare, 241, 262; affirmed (1852) 21 L. J. (Ch.) 248, 249.
(4) (1872) L. R. 13 Eq. 421, 424.
(5) (1874) 43 L. J. (Ch.) 661, 663.
(6) (1877) 6 Ch. D. 574.

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sine qua non in the case of a secret which the employee can commit to memory.]

In *Merryweather* v. *Moore* (1) the employee had made a table of dimensions of his employer's engines. Kekewich J. said: "Is it right that he should either retain or use these materials? If he can carry them in his head, no one can prevent his doing that and making use of them." In *Lamb* v. *Evans* (2) the judgments turned entirely on the physical materials obtained by the servant, and Kay L.J. said (3): "I use the word advisedly because it would be very difficult indeed to grant an injunction to prevent a man using his knowledge." The same difficulty was felt by Joyce J. in *Measures Brothers, Ld.* v. *Measures.* (4) In *Louis* v. *Smellie* (5) the Court of Appeal restrained the defendant from making use of copies or extracts from the plaintiff's book of agents, but Lindley L.J. said: "That, I think, is as far as we can go. If the defendant happens to remember that there is an agent whose address he can find out from the ordinary directories, he is at liberty to do it." In *Robb* v. *Green* (6) the servant had copied his master's list of customers. In *Cristol* v. *Powell* (7) Lord Coleridge J. on July 26, 1912, restrained an ex-servant from directly or indirectly soliciting his late master's customers. He had not made any list, but relied on his memory. On January 24, 1913, the Court of Appeal reversed this decision.

[ASTBURY J. None of these cases really touch the question of information as to a secret process acquired during a confidential employment. How can it possibly matter whether the servant learns the process by heart or writes it down? It is an equal breach of confidence to use or disclose it in either case.]

The Court ought not to restrain the use of a secret process of which it does not know the particulars, as it would have no means of enforcing the injunction: *Newbery* v. *James* (8); *Williams* v. *Williams.* (9)

(1) [1892] 2 Ch. 518, 524.
(2) [1893] 1 Ch. 218, 226, 229, 234, 236.
(3) [1893] 1 Ch. 236.
(4) [1910] 1 Ch. 336, 346.
(5) [1895] W. N. 115; 73 L. T. 226, 228.
(6) [1895] 2 Q. B. 1, 315.
(7) [1912 C. 351], unreported.
(8) 2 Mer. 446, 451.
(9) (1817) 3 Mer. 157, 160.

Hon. Frank Russell, K.C., in reply. In *Massam* v. *Thorley's Cattle Food Co.* (1) two people were in possession of the same secret obtained from the same source and there was no implied obligation inter se. At a later stage of the same case (2) Malins V.-C. says he decided that any person who has become acquainted with the process of manufacturing an article which is "in general request" is entitled to manufacture it. This case and *James* v. *James* (3) turned entirely on the use of the name and not on the secret process at all.

In *Lamb* v. *Evans* (4) the jurisdiction was based on implied contract. It is clearly not confined to physical materials. In *Robb* v. *Green* (5) Hawkins J. said: "The information was the property of his employers; the mere property in the paper is nothing"; and the judgment, after ordering delivery and destruction of the list of customers, restrained the defendant "from making use of the information obtained by him by copying or extracting such names and addresses."

The question in each case is what is the implied contract. In the case of an ordinary employment there is no implied obligation that the servant on leaving shall not solicit his master's customers, but he must not during his employment make a list for that purpose. In the case of a confidential employment on a secret process there is an implied obligation that the servant will not use or disclose information as to that process obtained by or disclosed to him during that employment. It cannot matter whether the information is retained in his brain or his book. (6)

As to the supposed difficulty of restraining the use of information Joyce J. said: "Of course there might be a case in which there was no difficulty in granting such an injunction. There might be some simple matter, one particular fact or another, and it might be possible to determine whether the defendant was using the information or not; but in this case it would be impossible": *Measures Brothers, Ld.* v. *Measures.* (7) In the present case it is manifest that the defendant is using the material

(1) 6 Ch. D. 574, 579.
(2) (1880) 14 Ch. D. 763, 770.
(3) L. R. 13 Eq. 421, 424.
(4) [1893] 1 Ch. 218, 229.
(5) [1895] 2 Q. B. 1, 16, 20.
(6) In *Green* v. *Folgham* (1823) 1 S. & S. 398, the defendant was declared trustee of a verbal secret and an account directed.
(7) [1910] 1 Ch. 336, 346.

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part of the secret he learnt in our employ and we are entitled to an injunction.

No doubt we shall have to disclose the whole secret to the Court before we can enforce the injunction: *Newbery* v. *James* (1); but in the circumstances we have sufficiently disclosed the secret to enable the Court to grant the injunction we ask.

ASTBURY J. (after a preliminary statement of facts). The first question I ought to deal with is what is the law applicable to this case? The defendant's counsel cited authorities with the view of shewing that the Court has no power in the absence of an express contract to restrain a man who has recently been in another's employ from making use of knowledge acquired by him during that employment, unless such knowledge has been surreptitiously obtained. I do not think that proposition can be maintained. In *James* v. *James* (2) the head-note is: "Any person who has, without the use of unfair means, become acquainted with the mode of compounding a secret unpatented preparation may, after the death of the original discoverer, make and sell the compound, describing it by the name of the discoverer, provided he does not lead the public to suppose that his preparation is the manufacture of the successors in business of the original discoverer; but he must not assert that his is the only genuine article, or suggest that the article manufactured by the successors of the original discoverer is spurious." It is perfectly true that in that case *Yovatt* v. *Winyard* (3) and *Morison* v. *Moat* (4) were apparently cited in the arguments, but Lord Romilly M.R. says: "If there had been a question of fraud, or the defendants were acting contrary to an agreement, by which they were not entitled to do what they have done, then the Court would interfere; but that is not the question here, for what the plaintiffs in this case really complain of is not of the defendants' making the preparation, but of their calling it Lieutenant James' Blister."

In my view, after giving the authorities the best attention I can, the law stands thus:—The Court will restrain an ex-servant from

(1) 2 Mer. 446, 451.
(2) L. R. 13 Eq. 421, 424.
(3) 1 Jac. & W. 394.
(4) 9 Hare, 241.

publishing or divulging that which has been communicated to him in confidence or under a contract by him, express or implied, not to do so: *Morison* v. *Moat* (1), and generally from making an improper use of information obtained in the course of confidential employment: *Tuck & Sons* v. *Priester* (2), and, further, from using to his late master's detriment information and knowledge surreptitiously obtained from him during his, the servant's, employment: *Robb* v. *Green*. (3)

In applying these principles I have to answer four questions of fact:—

First, Did the plaintiffs in fact possess and exercise a secret process?

Secondly, Did the defendant during the course of his employment know that this process was secret?

Thirdly, Did the defendant acquire knowledge during his employment of that secret or a material part thereof?

Fourthly, Has he since leaving the plaintiffs' employ made an improper use of the knowledge so acquired by him?

On the first point I hold as a fact that the plaintiffs did possess and exercise a secret process during the period the defendant was in their employ.

[His Lordship then reviewed the evidence on the second point and continued.]

I therefore hold that the defendant did during the course of his employment know that the process was in fact a secret one.

[His Lordship then reviewed the evidence on the third point and continued.]

I think it is clear that the defendant did in the course of his employment, knowing that the process was a secret one and intended to be kept secret, acquire knowledge with regard either to the whole or a very material portion of it, with this exception, that as late as last January, having obtained the special form of hydrometer G M 5, which he thought was the same as those he had seen at the plaintiffs' factory, he apparently found out that it did not measure or test the same density as the plaintiffs' similarly marked hydrometer, and he appears to have asked Otto

(1) 9 Hare, 241. (2) 19 Q. B. D. 629.
(3) [1895] 2 Q. B. 1, 315.

ASTBURY J. to obtain for him thermometers (meaning hydrometers) of which Otto apparently knew the right measuring capacity, in order that he might correct that want of knowledge.

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But I am bound to couple with that the fact that the defendant had quite enough experience to know that the density of such a liquid as that used depends practically upon the strength of the solution, and as I hold as a fact that he knew the materials used, his want of knowledge of the amount of incorrectness of the plaintiffs' scale must have been within quite small limits. It does not in the least follow that because he did not know the exact degree of wrongness of the plaintiffs' scale he did not know within a very small limit the density of the solution from the knowledge he had of its ingredients. At all events I am satisfied that the defendant during his employment acquired knowledge of very material portions indeed of this secret process.

On the fourth question whether the defendant since leaving the plaintiffs' employ has made an improper use of the knowledge so acquired by him there can be little doubt.

[His Lordship reviewed the evidence on this point. He held that the defendant had represented to his present employers and others that he could make the plaintiffs' size, and on these representations his present employers had for the first time embarked on the business of size-making. A sample of the defendant's size and a sample purchased from a customer of the plaintiffs, though not actually proved to be the plaintiffs' size, had been analysed and found to contain the same ingredients, namely, water, free rosin, combined rosin, soda, &c., though in slightly different proportions. The analyst had not detected any ingredient in the plaintiffs' which was not in the defendant's sample, but he had not carried his analysis far enough to find out that fact, if it were a fact. He had not analysed the rosin extracted from the defendant's sample, and in his view his analysis shewed that either the method of mixing or the proportions were different. His Lordship continued.]

It may very well be that there is a slight difference in the proportions and possibly in the densities owing to the trouble about the hydrometer; but the question I have to decide is

whether the defendant during his employment, which I hold was confidential, really obtained a sufficient knowledge of this secret to make it my duty to restrain him from making use of it.

[His Lordship then dealt with further evidence. He held that the purchase of the hydrometer G M 5 shewed that the defendant was making a direct attempt to put the knowledge he had acquired as to the scale of the plaintiffs' hydrometer into operation. The knowledge the defendant had already acquired of the ingredients of the mixture and the critical moment for adding it to the rosin size was information of a very important character for the purpose of trying to carry out the rest of the secret. His Lordship continued.]

It is perfectly obvious that the defendant's present employers took him into their employ because they considered or thought from what the defendant told them that he knew how to make and could make the plaintiffs' size, and I feel bound to hold on the last point that the defendant has since leaving the plaintiffs' employ made an improper use of the knowledge acquired by him during the time of his late employment.

There is one other matter I must refer to. I am very conscious of the fact that the plaintiffs have put the Court and their opponent into considerable difficulty by not disclosing their secret. It is perfectly clear that they are not bound to disclose their secret; but it is equally clear that there are means which the Court could adopt for enabling them to prove their secret without divulging it to the public.

I have been somewhat troubled during the course of this case in making up my mind what the Court ought to do where it is perfectly satisfied that there is a secret, and that the defendant has learnt a material part of it during his employment and has since made an improper use of the knowledge so obtained, but where the Court does not (at this stage of the action) know the full nature and extent of the secret process.

Now the Court will not and ought not to make an order performance of or obedience to which it cannot enforce. But in the event, which I trust will not occur, of any breach of the order I propose to make taking place on the part of the defendant there will be no difficulty in the plaintiffs supplying the

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Court, under proper safeguards protecting them from disclosure, with the details of their process in the event of their alleging disobedience to my order, and I do not think I am prevented by anything said by Lord Eldon L.C. in *Newbery* v. *James* (1) from making the order I propose to make.

The plaintiffs waive any claim for damages. I therefore merely grant an injunction to restrain the defendant from using the whole or any material part of the plaintiffs' secret method or process of manufacture of size the knowledge of which was acquired or obtained by him during his employment by the plaintiffs, and from disclosing to any other person, company, or firm any information with respect thereto, and I direct the defendant to pay the costs of the action.

Solicitors: *Swepstone, Stone, Barber & Ellis; Harris, Chetham & Cohen.*

G. R. A.

C. A. 1913 *May* 20.

BATTERSEA BOROUGH COUNCIL *v.* COUNTY OF LONDON ELECTRIC SUPPLY COMPANY, LIMITED.

[1913 B. 994.]

Injunction—Electric Lighting—Connecting two Areas of Supply—Connection already existing—London Electric Supply Act, 1908 (8 *Edw.* 7, *c. clxvii.*), *s.* 4, *sub-s.* 2.

Motion by the plaintiffs (who were the highway authority for the metropolitan borough of Battersea) for an injunction to restrain the defendants, who were "an authorized undertaker" within the London Electric Supply Act, 1908, from laying electric mains in any street or place within the plaintiffs' borough in order to connect two areas (Wandsworth and Southwark) which the defendants were authorized to supply with electrical energy. The injunction was asked for on the ground that those two areas were (and had for many years been) already connected.

Sect. 4, sub-s. 2, of the London Electric Supply Act, 1908, provides that "an authorised undertaker . . . . may . . . . by means of electric mains make a connection between any two or more areas which that authorised undertaker . . . . is authorised to supply . . . .":—

Held, affirming the decision of Joyce J., that the section did not

(1) 2 Mer. 446, 451.

authorize one connection only, but that connections might be made between two areas from time to time as required.

APPEAL from a decision of Joyce J.

By the Wandsworth Electric Lighting Order, 1892, confirmed by the Electric Lighting Orders Confirmation (No. 5) Act, 1892, the defendants, by their then name of the County of London and Brush Provincial Electric Lighting Company, Limited, were authorized to supply electrical energy within certain parishes now forming the metropolitan borough of Wandsworth.

By the Southwark Electric Lighting Order, 1892, the St. Olave Electric Lighting Order, 1895, the Camberwell Electric Lighting Order, 1896, and the St. Saviour's District Electric Lighting Order, 1896, all confirmed by Confirmation Acts passed in these years respectively, the defendants were authorized to supply electrical energy within the metropolitan boroughs of Southwark, Bermondsey, and Camberwell. The defendants were also authorized by other orders to supply electrical energy within various areas on the north side of the Thames.

On December 13, 1897, an agreement was entered into between the vestry of the parish of Lambeth and the company whereby the vestry in consideration of a yearly rent so far as they lawfully could or might but not further or otherwise granted to the company licence from time to time to lay, maintain, take up, and renew mains along five streets in the parish of Lambeth as should be approved by the electrical engineer and surveyor of the vestry. The company were not to supply electric energy to any property within the parish of Lambeth, and the vestry were to be at liberty at any time thereafter to give twelve months' notice to the company to determine the licence.

The defendants had two generating stations, one in Clerkenwell, from which a supply was given to its areas north of the Thames, and the other in Wandsworth near the Thames, from which a supply was given to Wandsworth, Camberwell, Southwark, and Bermondsey. The last two named boroughs were connected under the agreement with the Wandsworth generating station by a long main laid through Wandsworth, Lambeth, and Camberwell. For the purpose of ensuring the supply of electrical

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energy within their various areas, the defendants recently, under the powers of the London Electric Supply Act, 1908, laid a main from their Clerkenwell generating station across London Bridge to a sub-station in Southwark, and they now desired to lay a main from their Wandsworth generating station to Southwark through Battersea and Lambeth. They alleged that this main was advisable if not absolutely necessary to ensure the supply of energy throughout their south-eastern areas.

In pursuance of s. 4 of the London Electric Supply Act, 1908, the defendants served notices of their intention to lay the proposed main with plans on the London County Council and the Metropolitan Borough Councils of Wandsworth, Lambeth, Southwark, and Battersea, and the works had been approved by the county council and the borough councils of all the boroughs except Battersea.

By the London Electric Supply Act, 1908 (8 Edw. 7, c. clxvii.), after reciting, inter alia, that the London electric supply companies, including the County of London Electric Supply Company, Limited, had certain powers and were under obligation if so required to sell to the local authorities of the districts supplied by them so much of their undertakings as might be within the jurisdiction of such local authorities, by s. 2 provided that "London electric supply companies" should mean those specified in the First Schedule to the Act and referred to in the Act as a "supply company," and "authorised undertakers" should mean London electric supply companies and local authorities as defined by the Electric Lighting Act, 1882. Sect. 4 was as follows:—

"(1.) An authorised undertaker or a specified company for the purpose of carrying into effect any agreement for the giving or taking of a supply of electrical energy may by means of electric mains make a connection between the generating station or area of supply of one authorised undertaker or specified company party to the agreement and the generating station or area of supply of any other authorised undertaker or specified company party to the agreement.

"(2.) An authorised undertaker or a specified company may

also by means of electric mains make a connection between any two or more areas which that authorised undertaker or specified company is authorised to supply or between any such area and a generating station of that authorised undertaker or specified company.

"(3.) In relation to any such electric mains as aforesaid the authorised undertaker or specified company—

"(A) With respect to streets in any area which they are authorised to supply shall have the powers and be subject to the provisions of the Acts and Orders relating to their powers of supply in that area; and

"(B) With respect to streets not within any area which they are authorised to supply shall have the powers and be subject to the provisions of the Electric Lighting Act 1882 and of sections 10 to 20, 60 to 62, 69 to 73, 76, 77, and 79 to 82 of the schedule to the Electric Lighting (Clauses) Act 1899 and those provisions so far as applicable but subject to the provisions of this section shall be incorporated with this Act and shall have effect and the authorised undertaker or specified company laying the mains shall be deemed to be the undertakers.

"(4.) Any electric main laid down under the powers of this section shall be laid in such line or route and in a trench of such dimensions and in such a position as may be agreed between the authorised undertaker or specified company laying such main and the local authority of the district through which such main is to be laid, or as failing agreement shall be settled by an arbitrator to be appointed by the Board of Trade, and where any local authority object to any proposed line or route on the ground that it would traverse the principal thoroughfares or busy streets of the area over which they have jurisdiction, and indicate an alternative route or deviation which in the opinion of the arbitrator is both reasonably practicable and does not involve undue increase of expenditure, such alternative route or deviation shall be adopted:

"The reasonable and proper costs charges and expenses incurred by any local authority in relation to any arbitration under this sub-section shall unless the arbitrator shall certify that the action of the local authority in the matter has been unreasonable

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be paid by the authorised undertaker or specified company laying or seeking to lay the main in regard to which the arbitration took place:

"Provided that nothing in this section contained shall take away or prejudicially affect the rights of the Postmaster-General under section 14 of the schedule to the Electric Lighting (Clauses) Act 1899 incorporated herewith and the provisions of that section shall apply in respect of such alternative route or deviation. The provisions of this sub-section shall extend and apply to the London County Council as if they were a local authority.

"(5.) An electric main laid under the provisions of this section shall not be used for supplying electrical energy except within an area of supply of the authorised undertaker or specified company to whom it belongs or to an authorised undertaker or specified company under an agreement made in accordance with the provisions of this Act."

By s. 30 the agreement between the Lambeth Vestry and the company was not to be affected by the Act.

The Battersea Borough Council commenced an action to restrain the defendants from laying mains in Battersea and applied for an interlocutory injunction to that effect on the ground that Wandsworth and Southwark were already connected and that s. 4, sub-s. 2, of the Act of 1908 authorized one connection only.

Joyce J. refused the motion.

The plaintiffs appealed.

Hughes, K.C., and *S. Mayer*, for the appellants. This question turns on the construction of the London Electric Supply Act, 1908, which was passed in order to enable electric lighting companies to make connections between their generating stations and their areas of supply, but does not, we submit, authorize more than one connection in each case. The company's Camberwell area, which adjoins Bermondsey and Southwark, is already connected with Wandsworth. In order to make a second connection they now propose to lay a second main and for that purpose to break up our main streets for about three

miles. The Act gives them power to do this, but only for the purpose of making one connection, and powers to interfere with other persons' property will be construed strictly. It is not alleged that the proposed works are necessary. It is provided in the Act that questions in respect of the manner in which the works are to be carried out may be referred to arbitration; that does not refer to the number of connections which may be made, so it is reasonable to suppose that the Act did not contemplate more than one connection. The word "connection" in s. 4 means a connection between hitherto unconnected areas. The section has already been the subject of judicial decision in *London Corporation* v. *County of London Electric Supply Co.* (1), and, although the present question was not raised, that case, so far as it goes, is in our favour. The Act should be construed on the assumption that words of popular meaning must be taken in their popular sense unless there is something in the context to alter it, and that Parliament merely intended to give so much power as was necessary for carrying out the objects of the Act: *Wandsworth Board of Works* v. *United Telephone Co.* (2) The company cannot supply any electricity in our area, so they ought not to be allowed to interfere with our streets.

Sir A. Cripps, K.C., and *Tyldesley Jones*, for the company. By s. 32, sub-s. 1, of the Interpretation Act, 1889, "Where an Act passed after the commencement of this Act confers a power or imposes a duty, then, unless the contrary intention appears, the power may be exercised and the duty shall be performed from time to time as occasion requires." Therefore we may make connections from time to time. As neighbourhoods grow it is necessary to lay more mains. By s. 1, sub-s. 1, of the Interpretation Act, unless the contrary intention appears, "words in the singular shall include the plural." There is no context to the contrary in the sub-section now under discussion; so we are entitled to have several connections at the same time. Sect. 30 of the Act of 1908 shews that our present connection was known and it was not intended to tie us down to it. We have at present no direct communication between our generating station at Wandsworth and our area of supply at Southwark.

(1) [1910] 2 Ch. 208. (2) (1884) 13 Q. B. D. 904, 919.

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The proposed connection will be much shorter than that through Camberwell. On the plain words of s. 4, sub-s. 2, we are entitled to lay mains, not one main. The agreement of 1897 is probably ultra vires and is certainly precarious. We have applied to the Board of Trade under s. 4, sub-s. 4, for the appointment of an arbitrator to settle the details.

Hughes, K.C., in reply. The Interpretation Act does not extend the operation of the Act of 1908. That Act must be construed before the provisions of the Interpretation Act can be applied to it. The meaning of s. 4, sub-s. 2, of the Act of 1908 is that a connection may be made, not several, and the Interpretation Act does not turn the singular into the plural, although in order to make sense of an Act the words "from time to time" may be read into it, where without them the Act could not operate; for instance, if the existing connection were destroyed they might enable the undertakers to make another. The word "mains" is used in the plural in s. 4, sub-s. 2, to cover connections between more than two areas.

COZENS-HARDY M.R. This is an appeal from a decision of Joyce J., who has refused an injunction sought by the Battersea Borough Council against the County of London Electric Supply Company, Limited. It turns upon parts of s. 4 of the London Electric Supply Act, 1908. In order to appreciate the point it is necessary to state the circumstances in a very few words. [His Lordship stated the facts, and continued:] It is quite clear that the enjoyment by the company of the main through Lambeth is precarious, to say the least of it. It is open to the greatest possible doubt whether the vestry had any power to grant a right to take up the roads for this purpose. Certainly on the face of the agreement it was precarious, because it could be entirely put an end to on twelve months' notice. That being so, Parliament was minded, by this Act of 1908, dealing not particularly with this company or with the Battersea Borough Council, to give certain rights and privileges to this company, amongst others, and to the specified companies or authorities other than the present company. In clause 4 we find this. Parliament seems to have thought (I am almost taking the

words of Parker J., as he then was, in *London Corporation* v. *County of London Electric Supply Co.* (1)) that it was for the public advantage that where there were various electric companies or authorities having separate areas they should be able to unite and co-operate, subject to the consent of the Board of Trade, so far as streets were concerned, in this sense: that the Board of Trade might object to the particular route and define some other route if it was shewn to be not unreasonable. By s. 4 two things were provided. Sub-s. 1 of s. 4 contemplates an agreement between the two parties; there is nothing obligatory on the subject. It says this: "An authorised undertaker or a specified company, for the purpose of carrying into effect any agreement for the giving or taking of a supply of electrical energy may, by means of electric mains, make a connection between the generating station or area of supply of one authorised undertaker or specified company party to the agreement and the generating station or area of supply of any other authorised undertaker or specified company party to the agreement." Is it possible to say that under that section there can be only one connection made? Do not the words "make a connection" between two things mean connect the two things, and nothing more or less than that? "Make a connection" does not seem to me to mean "make or construct a particular tube or tunnel or conduit," nor is that one physical thing what alone is referred to. I think it means physically to connect, and to do that as many times as the agreement may authorize; not merely once and once for all. Then we come to the case where there is no agreement, which is the present case. It is sub-s. 2: "An authorised undertaker or a specified company may also by means of electric mains make a connection between any two or more areas which that authorised undertaker or specified company is authorised to supply, or between any such area and a generating station of that authorised undertaker or specified company." Why am I to read the words in sub-s. 2 in any different mode or manner from that in which I think they ought to be read in sub-s. 1? Why does it mean anything more than this: An authorized undertaker may also, by means of electric mains,

(1) [1910] 2 Ch. 208.

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make a connection between any two or more areas which that authorized undertaker is authorized to supply? Then it goes on, in sub-s. 3 (B), to say: "With respect to streets not within any area which they are authorised to supply"—that is when they cross another area—then certain statutory provisions are to apply. And sub-s. 4 interposes the power of the Board of Trade in the event of there being any unreasonable act on the part of the electric light company, as to what particular streets they may take up.

Applying that to the present case, we have here that the company desired, and have given proper notice, to make a connection, or to connect, as I should prefer to say, the northernmost part of the Southwark area with the Wandsworth area; the effect of which will be, in round figures, that instead of going thirteen miles round the distance will be six miles. Battersea, which is one of the areas through which the proposed main will pass and itself is an electric light supply body, objects and says, "You have no right to come along our streets at all. You can get round by the present line; all that the Act of Parliament gives you is the right once for all to make a connection; and so long as there is a connection between these two places, although it is one which is terminable at twelve months' notice, the statutory power does not arise." I am unable to assent to that view. I think, without attaching too much weight to the provisions of the Interpretation Act, to which Mr. Tyldesley Jones called our attention, this is a case in which, so far from there being any contrary intention, there is every reason to suppose that Parliament meant that connections might be made from time to time. I cannot bring myself to think that Parliament, with notice of the agreement of 1897 between the Lambeth Vestry and the company, and notice of the precarious title which this company had, did not intend to give the company greater rights, and to put them into a more secure and perfect position, in order that they might supply electric light to this large and growing district.

For these reasons I think that the learned judge was right in the view which he took. He did not express a final concluded opinion, because it was an interlocutory application; but in substance I think the view which he took was right, and that

the view which the plaintiffs sought to enforce cannot be maintained. Treating this motion as the trial of the action, I think that judgment ought to be entered for the defendants with costs here and below.

KENNEDY L.J. I am of the same opinion. It is quite clear that this Act, the London Electric Supply Act, 1908, is an Act which, amongst other things, was intended to include, and I think in this section does include, an enlargement of the power of developing the supply of electricity, and the extension of the generation, at certain stations in the metropolis, of electric energy. The first sub-section in s. 4 says, in effect, that if you are "an authorised undertaker or a specified company"—the words "undertaker" and "specified company" having been previously interpreted in the Act—if you are such an undertaker or specified company, and you have an agreement for the purpose of "the giving or taking of a supply of electrical energy," you may lay electric mains. For what end? In order to connect "the generating station or the area of supply of one authorised undertaker or specified company" to "the generating station or area of supply of any other authorised undertaker or specified company," that undertaker or specified company being in each case a party to the agreement. Those are wide and general terms; and in so far as sub-s. 1 throws light on sub-s. 2, it seems to me that we cannot reasonably read it as limited to a particular agreement for a single connection to be made once and for all. Nor do I think that we can refuse to sanction the use of the powers given under s. 4, sub-s. 1, because there has been before the passing of the Act, or at an earlier stage under the Act, a connection existing between the works of the parties to the agreement. I see no justification in the language for so limiting it; and I decline to go beyond the natural meaning of the words, and to read into them a provision for making a single connection, or, where the words "make a connection" occur, to interpret them as meaning "make a connection upon one and upon no other occasion." Without reference at all to the Interpretation Act, it seems to me that that is to give the words a forced meaning. Of course the

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words "a connection" may, in a certain context, imply a single act; but it requires a special context, and I think, as has already been said by the Master of the Rolls, that "make a connection" here really means "may connect"—connect for the purpose of carrying out any agreement for the supply of electrical energy. Then we come to sub-s. 2, and sub-s. 2 is a continuation of s. 4, sub-s. 1: "An authorised undertaker or a specified company may also"—they may do something more, that is—"by means of electric mains make a connection between any two or more areas which that authorised undertaker or specified company is authorised to supply"; that is to say, they may connect by means of electric mains these areas, whether they be two or whether they be more; or may do so "between any such area"—that is between an area which the undertaker or the company is authorized to supply—"and a generating station of that authorized undertaker or specified company." That is, instead of merely connecting two areas which the undertaker and the company are authorized to supply, they may lay mains in order to connect "any such area and a generating station of that authorized undertaker or specified company" elsewhere. That seems to me to be the natural meaning of the words. The company are urging no more than is their right in saying, "We wish to connect by a line running through the area of the other party to this litigation, the Battersea Borough Council"; and it is no sort of answer to say, "Yes, but then you have already a connection not along this line, but a thirteen mile connection in another way; therefore, you are not to exercise the powers which so far as appears upon the surface, and apart from that fact, you are clearly entitled to under sub-s. 2." As I have already said, it seems to me, in their ordinary and natural interpretation, to "make a connection" does not mean to make only one connection; and further, as has been pointed out, the words are not "electric main," but "electric mains"; and that naturally means more mains than one. But further than that, I do not see, upon further consideration, that that which appeared to me at first to be a strong argument advanced on the part of the Battersea Borough Council has any force. It was said that under sub-s. 4,

while the arbitrator appointed by the Board of Trade might deal with the right route to be pursued, and substitute for the proposed route another as being more reasonable and practicable, there was no power to prevent the laying of a line through the area. I do not agree. I think that the arbitrator who found a connection already made for the purposes mentioned in sub-s. 2 could not in terms say, "You shall not make the connection through the particular area"; but, if he was satisfied that it was, for public reasons, inconvenient, and that there was no paramount reason for taking the proposed route, and found that there was another connection already existing, he could say, "I find it both practicable and reasonable, if you want to lay new mains, that you should lay them along the line where you have already power to lay and maintain such further mains as you now want." But I desire to base my judgment, as I think the Master of the Rolls has done, upon what I may call the natural interpretation of the words of the Act of Parliament.

THE PRESIDENT (SIR S. T. EVANS). The matter has been so fully dealt with by the Master of the Rolls and Kennedy L.J. that I propose to add but a very few words. I think the argument for the plaintiffs involves much too narrow a reading of this sub-section of this Act of Parliament. The argument is founded almost solely, so far as the reading of the section is concerned, upon the phrase "may make a connection." If that phrase is equivalent to the phrase "may connect," as has been pointed out, and I think it is equivalent, and if we substitute the phrase "may connect" for the phrase which appears in the section of the Act of Parliament, the whole of Mr. Hughes' argument would fall to the ground. It is simply from the use of the single phrase "make a connection" that he was able to adduce the argument at all. I agree with the Master of the Rolls and Kennedy L.J. that Parliament never intended the operation of this section to be so narrow as that. I think it intended the powers to be enlarged, as has been stated; and intended to give full and reasonable powers to the various authorized undertakers or specified companies to connect the areas in respect of which they were supplying electricity. The reading of the sub-section

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in the way in which Mr. Hughes wanted the Court to read it would also involve this: that the sub-section would not apply at all to the very large area which is to be found on the south side of the river; and it would involve inserting in the section—a thing which is entirely unjustifiable—the words "not otherwise," or "not previously connected." I doubt very much myself whether all these various separate areas, separate for the purpose of separate provisional orders, were previously connected at all in the proper sense. They certainly were not directly connected. However that may be, I think the correct reading of the section is that whenever it is necessary in carrying on the business of these companies to make connections between the various parts of their areas, this section of the Act of Parliament gives them that power.

I was impressed at first with the argument which was adduced on the other side, to the effect that reading the section the other way would give much too large and extensive powers to these companies at the expense of the local authorities who own streets. I think the answer to that is twofold. First of all, you must regard the matter from a business point of view. Companies of this description are not going to spend their money and take the trouble to evolve new schemes and carry out those new schemes, if they are wholly unreasonable. In the second place, as Kennedy L.J. has just pointed out, there is practically the power under sub-s. 4 of s. 4 for the Board of Trade to stop any unreasonable use of the power which is given by the enactment. I, therefore, think the Battersea Borough Council fail in their action.

Solicitors: *Paul Caudwell; Sydney Morse.*

H. C. R.

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[1911 A. 1471.]

Charity—Endowment for a "Sermon" once a Year—Increase in the Income—Cyprès—Religious Purposes—Trustees—Scheme.

By a deed of 1580 land was assured to trustees to the intent that the rents should be employed for or towards the charges of a sermon once every year to be made in the parish church of West Ham. The rents had largely increased, and by an order made in 1912 by Parker J. in this action it was declared that such part of the income as was not required for payment for the sermon ought to be applied cyprès the objects of the gift for the sermon. The old parish of West Ham was conterminous with the present borough, containing some 300,000 inhabitants. This area was now divided into nineteen ecclesiastical parishes, of which the parish served by the old parish church, containing some 25,000 inhabitants, was one. On a summons taken out to determine the principles upon which the scheme should proceed:—

Held, that the charity was religious in its object and that no part of the income ought to be applied for a non-religious purpose, such as lectures in the town hall for the moral or intellectual improvement of the inhabitants or in aid of a public library; but that the whole income might properly be applied in or towards payment of the stipends of one or more assistant curates to serve in the church and parish, and subject thereto in or towards the expenses incurred by the vicar in providing for the services of the church, the visitation of the poor, or the religious instruction of the inhabitants, including children and young persons.

Held, also, that the scheme ought to be confined to the parish served by the old parish church of West Ham.

Held, also, that the vicar and churchwardens and persons to be appointed by them and by the bishop of the diocese were proper persons to be appointed trustees, but that the mayor of West Ham or the overseers or persons to be appointed by the borough council ought not to be appointed.

Held, also, that there was no objection to the vicar of the parish himself preaching the annual sermon and receiving a proposed fee of ten guineas therefor.

Adjourned Summons.

By an indenture of bargain and sale enrolled in Chancery, dated March 10, 1580, Nicholas Avenon, described as citizen and merchant taylor of London, assured two parcels of land, together comprising some six acres, situate in the parish of West Ham, to

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Antony Bridges, gentleman, and eleven other named persons, all described as parishioners of the parish of West Ham, to the intents and purposes thereafter expressed and to no other intents and purposes, (that is to say) that they should with the rents and profits give and distribute weekly upon every Sabbath day in the forenoon at or in the nether part of the parish church of West Ham to and amongst four and twenty poor and needy folk two shillings in loaves of bread, the residue of the profits (if any) over and above the said sum of two shillings a week to be employed for or towards the charges of a sermon once every year to be made within the same parish church; and it was thereby agreed that if all the feoffees but four should die, then the survivors should assure the said lands unto twelve other persons of good credit of the said parish of West Ham upon the same intents and purposes.

In former times the parish of West Ham was conterminous with the present borough. That area, now containing some 300,000 inhabitants, was now divided into nineteen ecclesiastical parishes, of which that served by the ancient parish church of All Saints was one, containing some 25,000 inhabitants.

In a report of the Charity Commissioners, dated July 19, 1833, it was stated that the property of the charity was then let at a yearly rent of 21*l.*, and that the vicar received the rent and distributed twenty-four penny loaves every Sunday at the church to poor and deserving parishioners, and retained the remainder in respect of a sermon which he preached on Ash Wednesday.

In 1869 application was made to the Charity Commissioners in the matter of several charities in West Ham, including Avenon's Charity; and in 1870 a scheme was approved and established under which the vicar and churchwardens and overseers of the poor and their respective successors for the time being, therein referred to as "the Central Charities Board," were appointed trustees of the estates and property of the charities and to have the administration and management thereof for the purposes of the scheme. The scheme vested the lands belonging to or held in trust for the charities in the Official Trustee of Charity Lands, and "as to the distributive charities" divided the net income of these charities into fifty-six parts, to

be paid as to one fifty-sixth part to the Charity Board for the parish of West Ham, to be applied by them for the benefit of the most deserving and necessitous inhabitants of the same district as therein provided. In 1880 one acre of the land was sold. The residue had been let on building leases, the total rents now amounting to about 320*l.* a year.

By an order of the Local Government Board dated March 19, 1897, made under the Local Government Act, 1894, s. 33, the West Ham Council were empowered to appoint seven overseers, three of whom were in lieu of the three churchwardens. The functions of the old vestry board so far as civil matters were concerned were assumed by the seven new overseers, but the Local Government Board order had no reference to ecclesiastical matters.

By an order of the Charity Commissioners dated February 6, 1903, the charities of West Ham other than Avenon's Charity were dealt with in new ways and the West Ham United Non-Ecclesiastical Charity Board was established. Thereafter the West Ham Central Charity Board ceased to meet, but down to the year 1910, when local disputes arose, the rents of Avenon's Charity over and above the annual sum of 5*l.* 4*s.* (which was paid to the new Non-Ecclesiastical Board) had been paid to the vicar of All Saints, West Ham, and applied by him for church work. Questions having arisen as to the proper application of the income of Avenon's Charity and in whom the trusteeship had become vested, on October 31, 1911, the Attorney-General commenced this action by originating summons for the purpose, amongst other things, of obtaining a scheme for the future administration of the charity and the appointment of trustees thereof, the defendants being the vicar and churchwardens, the overseers, and the Crown, represented by the Solicitor-General, as patron of the living.

The summons came on before Parker J. on January 22, 1912, who decided that as a matter of construction the weekly sum of 2*s.*, amounting to the annual sum of 5*l.* 4*s.*, was a charge upon the rents which was not capable of increase or decrease, and that the whole available residue of the rents was given upon trust for the payment of an annual sermon in the parish church, and that having

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regard to the increase in the rents such parts as were not required for the payment of the sermon ought to be applied cyprès with the object of the gift for the sermon. The scheme of 1870, in his Lordship's opinion, did not deal with or intend to deal with this residue, but only with the distributive charity in the ordinary sense, namely, the annual sum of 5*l.* 4*s.* for the provision of loaves for poor people. His Lordship considered that it was unnecessary to decide whether the overseers or some of them were the existing trustees of the charity since the proposed new scheme would contain provisions for the management of the charity and those provisions would supersede all the existing trustees, whoever they were. His Lordship accordingly ordered that a scheme for the administration of the said charity on the above footing and the appointment of trustees of the charity be settled by the judge in chambers, and the defendants, the overseers, were to be at liberty to attend on the settlement of the said scheme. (1) Pursuant to the order the Attorney-General carried into chambers a draft scheme. To this objections were taken by the vicar and churchwardens on the one hand and the overseers on the other, which raised questions of principle which had been adjourned into Court for determination.

The draft scheme so far as material was as follows:—

"Property.

"1. The property to which this scheme relates consists of 407*l.* 18*s.* Consols held by the Official Trustees of Charitable Funds or so much thereof as shall remain after payment thereout of such costs (if any) as the Court shall direct to be paid, and of five acres of land or thereabouts situate in the parish of West Ham let upon building leases for terms expiring at dates ranging from 1963 to 1975 and at total rents amounting to about 320*l.* a year. The real estate is to be vested in the Official Trustee of Charity Lands.

"2. The management of the trust property and the administration of the charity shall subject to the provisions of this scheme be vested in trustees consisting of the vicar and churchwardens for the time being of the parish of West Ham (All Saints), the mayor for the time being of the borough of West Ham, and of

(1) See *In re Avenon's Charity, Attorney-General* v. *Pelly* (1912) 106 L. T. 295.

five others (herein termed appointed trustees), of whom two and their successors shall from time to time be appointed by the Lord Bishop of the diocese within which the parish of West Ham is situate, two and their successors shall from time to time be appointed by the council of the borough of West Ham, and one and his successors shall from time to time be appointed by the churchwardens for the time being of the parish of West Ham (All Saints).

"3. Each appointment of an appointed trustee shall subject to the provisions of clause 6 hereof be made for a term of four years if the appointee shall so long live. Appointees of the council may or may not be members of the council."

"6. Any appointed trustee who is absent from all meetings during a period of one year and any appointed trustee who is adjudicated a bankrupt or is incapacitated to act or who communicates in writing to the trustees a wish to resign shall thereupon cease to be a trustee."

"18. Save as provided in clauses 20, 21 and 22 with respect to the vicar of West Ham, no trustee shall take or hold any interest in any property belonging to the charity otherwise than as a trustee for the purposes thereof, and no trustee save as last aforesaid shall receive any benefit or remuneration at the cost of the charity and no trustee shall be interested in the supply of work or goods at the cost of the charity.

"19. Out of the income of the trust property there shall be paid to the trustees of the United Non-Ecclesiastical Charities constituted by the scheme relating to West Ham charities sealed by the Commissioners on February 6, 1903, the sum of 5*l.* 4*s.* per annum (provided for loaves on the foundation of the trust) . . . . The surplus shall be applied as follows:

"20. All income accrued to the date of the said order of January 22, 1912, shall be paid to the defendant Canon Pelly as the vicar of West Ham (All Saints) in reimbursement of monies expended or to meet expenses by him in connection with the work of the church in the said parish.

"21. As from January 22, 1912, there shall be paid annually out of the income of the charity to the vicar for the time being of the parish church of West Ham ten guineas for the preaching

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on a day to be publicly announced in church of a sermon in such church by such vicar or for procuring such sermon to be preached by any one duly selected by such vicar. Payment shall be made to the vicar on or about the 10th of March in every year, the first payment as for the 10th of March, 1912, being made immediately this scheme shall come into operation.

"22. The balance of the annual income remaining after the aforesaid payments and after payment of the expenses of management of the estate and general administration of the charity shall (subject to the provisions of clause 25 hereof) as from January 22, 1912, be divided into four equal parts, and one fourth part shall be devoted to procuring periodical public lectures to be given in the town hall of West Ham or in some other suitable place in the parish (not being a building registered as a place of public worship) for the moral and intellectual improvement or benefit of the inhabitants of the said parish and district. All necessary expenses in or about the lectures, including the payment of lecturer's fee or stipend, the hire of premises, advertising and the like, shall be defrayed by the trustees out of the said one fourth part of the balance of income. The subject or subjects of the lectures shall be determined annually by the trustees and shall with all necessary information be publicly announced by them.

"23. Provided that, if at any time it shall be considered by the trustees that owing to the smallness of attendance or any other cause the system of lectures for which provision is hereby made fails to produce as good a result as could reasonably be expected, the trustees shall not be bound to expend thereon all of the said fourth part of income, and any surplus not required in any year for this purpose may be subsequently expended in lectures as aforesaid, or may at the discretion of the trustees be applied towards purchasing educational or instructive works to be presented to all or some one of the public libraries in West Ham and treated like their other store of books.

"24. The remaining three fourths of the said income shall be paid to the vicar for the time being of the parish of West Ham (All Saints) to be applied by him in or towards the expenses incurred by the vicar in furtherance of the spiritual and moral

welfare and advantage of the parish or any of the inhabitants thereof, including children and young people, as he may think fit, with power to expend all or any part thereof in payment to curates to serve in the said church and parish.

"25. If and when the net income of the trust property divisible under clause 23 hereof shall exceed the annual sum of 450*l.* the residue of income over 450*l.* shall be accumulated and the trustees shall apply to the Court upon notice to the Attorney-General for further directions or a new scheme."

The vicar and churchwardens objected to paragraphs 2, 3, 18, and 22 to 25 of the draft scheme for the following reasons:—

"Objections to paragraphs 2 and 3: It is submitted that in accordance with the order of the Court of January 22, 1912, and the declaration made therein the scheme ought to be settled upon the footing that, after payment of the sums specified in paragraph 19, the surplus income of the charity should be applied cyprès with the objects of the founder of the charity in giving such surplus for the payment of the charges of an annual sermon to be preached in the parish church of West Ham, and that accordingly such surplus should be applied to purely ecclesiastical objects. It is therefore submitted that as the mayor of West Ham and the borough council are purely civil authorities such mayor and appointees of such borough council would not be appropriate persons to administer the charity. The mayor and appointees of the borough council should not therefore be trustees.

"It is submitted that paragraphs 2 and 3 should provide as follows:—

"2. The management of the trust property and administration of the charity shall, subject to the provisions of this scheme, be vested in trustees consisting of the vicar and churchwardens for the time being of the parish of West Ham (All Saints) and of two others (herein termed appointed trustees), who and their successors shall from time to time be appointed by the Lord Bishop of the diocese within which the parish of West Ham is situate.

"3. Each appointment of an appointed trustee shall subject to the provisions of clause 6 hereof be made for a term of four years if the appointees shall so long live.

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"Objections to paragraph 18: No objection is taken to this paragraph if the scheme is amended and settled as herein proposed, but if the scheme as settled by the Master is approved by the judge, the words 'Save as provided in paragraphs 20, 21 and 22 with respect to the vicar of West Ham' would need amendment, as there are no express provisions in paragraph 22 with respect to such vicar, and there are provisions in paragraph 24 with respect to him which render necessary its inclusion in the saving words. It is also submitted that the vicar of West Ham should not be disqualified from becoming a lecturer under paragraph 22 and it is accordingly submitted that paragraph 18 should provide as follows:—

"18. Save as provided in paragraphs 20, 21 and 24 with respect to the vicar of West Ham and save also that such vicar shall not be disqualified from becoming a lecturer and receiving the lecturer's fee or stipend as provided in paragraph 22, no trustee shall take or hold any interest in any property belonging to the charity otherwise than as a trustee for the purposes thereof, and no trustee save as aforesaid shall receive any benefit or remuneration at the cost of the charity, and no trustee shall be interested in the supply of work or goods at the cost of the charity.

"Objections to paragraphs 22, 23 and 24: It is submitted that the proposed division of the balance of the annual income dealt with in these paragraphs into four parts and the devotion of one of those parts in the manner proposed in paragraphs 22 and 23 is not in accordance with the order and declaration of January 22, 1912, and would be an application of part of such balance to objects which are not cyprès with those which the founder of the charity must be presumed to have had in view in giving the annual surplus for the payment of the charges of an annual sermon to be preached in the parish church. The delivery of lectures and the purchase of books, which might not be in accordance with and might even be hostile to the doctrines of the Church of England, could not be regarded as ejusdem generis or cyprès with the preaching of a sermon in the parish church, and ought not to be approved, especially where there are other applications which are nearer to the object which the

founder must be deemed to have had in view, viz., the furtherance of the spiritual and moral welfare of the parishioners in connection with the Church of England.

"It is submitted that the proposed application of the other three fourths of the balance specified in paragraph 24 is in accordance with the order of the Court and is cyprès with the objects which the founder had in view, and that the balance ought not to be divided but the whole should be applied in the manner specified in paragraph 24. It is submitted therefore that in place of paragraphs 22, 23 and 24 of the proposed scheme there should be a single paragraph to the following effect:—

"22. The balance of the annual income remaining after the expenses of management of the estate and the general administration of the charity shall be paid to the vicar for the time being of the parish of West Ham (All Saints) to be applied by him in or towards the expenses incurred by him in furtherance of the spiritual and moral welfare and advantage of the parish or of any of the inhabitants thereof, including children and young people, as he may think fit, with power to expend all or any part thereof in payment to curates to serve in the said church and parish.

"Objection to paragraph 25: It is submitted that this paragraph is unnecessary and that the balances should continue to be applied as herein proposed although the income may exceed 450*l.* per annum."

The overseers raised the following objections to the draft scheme:—

"A. Generally,

"(1.) Because the said scheme as framed does not give due effect to the judgment of Mr. Justice Parker, who declared that the surplus of the income of the funds ought to be applied cyprès the objects of the gift for the sermon.

"(2.) Because the main or principal object of the gift for the sermon was the instruction, education and enlightenment of the parishioners of the original parish of West Ham, and not the endowment or support of the ecclesiastical organization of such parish, or any part thereof, or the advancement of any purely ecclesiastical or spiritual purpose.

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"(3.) Because the said scheme in effect places the bulk of the income of the charitable property at the absolute disposal of the vicar of All Saints for ordinary church purposes and thereby fails to recognize or effectually to secure the carrying out of the principal objects of the gift as indicated above.

"(4.) Because, though the parishioners of the original parish of West Ham were the class for whose benefit the charity was created, the said scheme confines the benefits proposed to be thereby conferred in fact or in effect to the parishioners of the parish of All Saints, being one only of the nineteen ecclesiastical parishes into which the original parish of West Ham has been divided.

"(5.) Because in no event ought any part of the property of the charity to be applied for a purely ecclesiastical or spiritual purpose or towards the discharge of any of the expenses which ordinarily fall to be provided for by the incumbent of an ecclesiastical parish in the ordinary course of his parochial duties or activities.

"B. With respect to particular clauses,

"(1.) As to clause 2, (*a*) because it is not in accordance with the principles upon which the scheme should be framed that in the trustees as a body the ecclesiastical element should in point of number predominate or be strongly represented, and the introduction of the Lord Bishop of the diocese into the matter is not justified, nor can the omission of the overseers as trustees be justified, and

"(*b*) Because in any case there is no ground for the representation on the body of the trustees of the ecclesiastical parish of All Saints to the exclusion of the other parishes carved out of the original parish of West Ham.

"(2.) As to clause 20, because no special provision ought to be made exclusively applicable to past income and because in any case such past income ought only to be applied in accordance with the principles hereinbefore indicated and ought not to be treated exclusively or at all as a fund collected for church work.

"(3.) As to clause 21, because the amount to be paid for the preaching of the sermon is excessive and because it is not proper or in accordance with the spirit or object of the gift for the

sermon that the sermon should be preached by the incumbent or any of the assistant clergy of the parish of All Saints.

"(4.) As to clause 22, because there is no justification for limiting to the parish of All Saints the area in which the lectures may be given.

"(5.) As to clause 24, because the proposed application is wrong and cannot be justified having regard to the principles hereinbefore indicated and because the effect of the clause in question is really to provide that the moneys to which it relates may be used as an augmentation of the benefice of All Saints, West Ham."

E. Beaumont, for the Attorney-General.

Cave, *K.C.*, and *Sir Alfred Kempe*, for the vicar and churchwardens. As to the broad principle the whole available income should be applied for religious or ecclesiastical objects. At the date of the foundation of the charity the word "sermon" had, as it now has, a technical meaning pointing to a religious discourse. It is so used throughout the Injunctions of Edward VI. and Elizabeth; for instance, the Injunctions of Elizabeth of 1559 in prescribing the preaching of monthly "sermons" by parsons provided that they should therein "purely and sincerely declare the word of God, and in the same exhort their hearers to the works of faith, as mercy and charity, specially prescribed and commended in Scripture": Injunction 43 (3.); Cardwell's Documentary Annals (1844 ed.), vol. i. p. 213; see too Articles of Religion 23 and 35; Canons of 1603, 45, 46, and 47; the Act of Uniformity, 1662 (13 & 14 Car. 2, c. 4), ss. 15—19; the Act of Uniformity Amendment Act, 1872 (35 & 36 Vict. c. 35), s. 6; and the Ordination of Deacons and Priests and the Communion Service in the Book of Common Prayer, and the Preface to the Homilies.

The propriety of the application for which we contend is supported by 7 & 8 Vict. c. 59, s. 1, which provides that where lecturers or preachers are "appointed to deliver or preach lectures or sermons only, without the obligation of performing other clerical or ministerial duties," the bishop may require them to act as stipendiary curates. This provision shews that

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Parliament regarded the application of endowments given for the purpose of the payment of preachers to the payment of persons to act both as preachers and stipendiary curates as a proper application.

The charity as founded should be regarded as one provided in connection with All Saints, the particular church in which the sermon was to be preached, notwithstanding the subsequent subdivision of the old parish, and not as one which the Court would apportion under 8 & 9 Vict. c. 70, s. 22: *In re Church Estate Charity, Wandsworth* (1); *Attorney-General* v. *Love* (2); *In re Palatine Estate Charity.* (3)

If our contention is well founded it follows that secular trustees, such as the mayor or overseers or persons to be appointed by them or the borough council, ought not to be appointed trustees of this charity. [They also cited *Rex* v. *Bishop of Exeter.* (4)]

Austen-Cartmell, for the Solicitor-General, supported the same arguments.

Danckwerts, K.C., and *T. J. C. Tomlin,* for the overseers. The question is what were the objects which the founder had in view in the foundation of this charity. The scheme must be framed cyprès those objects and not cyprès the means which then existed for giving effect to them. The objects were the moral and intellectual as well as the religious welfare of the inhabitants, and the church was in those days the only building suitable for the purpose. It is common knowledge that the church in those days was used for many purposes other than those connected with religion; for instance by this very deed the loaves were directed to be distributed in the nether part of the church. The word "sermon" was never confined to a purely religious discourse. In Latham's Dictionary, founded on Johnson's, it is called a "discourse of instruction pronounced by a divine for the edification of the people." *Attorney-General* v. *Master of Brentwood School* (5) and *In re Ashton's Charity* (6) shew the

(1) (1871) L. R. 6 Ch. 296, 300, per James L.J.
(2) (1857) 23 Beav. 499.
(3) (1888) 39 Ch. D. 54, 57.
(4) (1802) 2 East, 462.
(5) (1833) 1 My. & K. 376.
(6) (1859) 27 Beav. 115.

principles upon which the Court proceeds in such cases. The draft scheme, so far as it relates to three fourths of the income, and the proposals of the vicar and churchwardens proceed upon too narrow a view and would in effect apply the income as additional remuneration for duties which the incumbent is already bound to discharge. That was not the intention of the founder, who contemplated the benefit of the parishioners by services to be procured by money, and therefore something which was outside the ordinary duties of the incumbent; and on the same ground, though it is a small matter, the vicar ought not to preach the annual sermon and receive the proposed fee of ten guineas.

There is no reason for confining the scheme to the present parish of All Saints. In *In re Church Estate Charity, Wandsworth* (1) and *Attorney-General* v. *Love* (2) the charity related to the actual fabric of the church. If we are right on the general principle the body of trustees is too ecclesiastical, and it is noticeable that all the trustees of the original deed of 1580 appear to have been laymen; and there is no sufficient reason for the removal of the overseers.

It also follows that the whole income and not one fourth merely ought to be applied in accordance with our contention.

Apart from the general objections, clause 24 of the draft scheme is wrong in not requiring the vicar to render accounts, and moreover the mode of application under that clause is too vaguely expressed: *Hunter* v. *Attorney-General.* (3) [They also referred to *Rex* v. *Bishop of London* (4) and *In re Campden Charities.* (5)]

E. Beaumont in reply.

Cur. adv. vult.

May 27. WARRINGTON J. delivered the following written judgment:—By a deed dated March 10, 1580, lands in West Ham were conveyed by one Nicholas Avenon to certain persons to the intent that the rents and profits thereof, after providing a fixed sum of 5*l.* 4*s.* per annum for a purpose not material to the

(1) L. R. 6 Ch. 296.
(2) 23 Beav. 499.
(3) [1899] A. C. 309.
(4) (1786) 1 T. R. 331.
(5) (1881) 18 Ch. D. 310.

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present question, should be employed for or towards the charges of a sermon once every year to be made in the parish church of West Ham.

Since the date of the deed the amount of the rents and profits has largely increased—it is now in fact upwards of 300*l.* a year, greatly exceeding any sum which could properly be applied for the charges of an annual sermon. Under a scheme made by the Charity Commissioners in the year 1870 for the regulation of various charities in West Ham the vicar, churchwardens, and overseers of the poor of the parish became trustees of the estates and property of the charity, but no directions were thereby given as to the application of the sermon fund. Until recently the income was paid to the successive vicars of the ancient parish church, now called All Saints, West Ham, and has been by them expended in meeting the expense of church work of various descriptions.

This mode of expending the income, not being in accordance with the terms of the deed and not having been sanctioned by any scheme, was of course improper; in the year 1910 the payment to the vicar was suspended, and on October 31, 1911, this action was commenced by the Attorney-General for the purpose, amongst other things, of obtaining a scheme for the future administration of the charity, the defendants being the vicar and churchwardens, the overseers of the poor, and the Crown, represented by the Solicitor-General, as patron of the living. By an order dated January 22, 1912, it was, amongst other things, declared that, having regard to the increase in the income, such part of the income as is not required for payment for the sermon ought to be applied cyprès the objects of the gift for the sermon, and it was ordered that a scheme for the administration of the said charity on the above footing and the appointment of trustees of the charity be settled by the judge in chambers, and the defendants, the overseers, were to be at liberty to attend on the settlement of the said scheme. Pursuant to the order the Attorney-General carried into chambers a draft scheme. To this objections were taken by the vicar and churchwardens on the one hand and the overseers on the other. The objections raise questions of principle which have been adjourned into Court for determination.

Passing over for the present some matters of minor importance, it is proposed by the draft scheme that one fourth of the income after paying for the sermon be devoted to procuring lectures to be given in the town hall or other suitable place in West Ham for the moral or intellectual improvement of the inhabitants of the parish and district, with a power for the trustees as an alternative in certain events to use the income for the purpose of educational or instructive works to be presented to some or one of the public libraries in West Ham; and that the remaining three fourths shall be paid to the vicar for the time being of the parish of West Ham (All Saints) to be applied by him in or towards expenses incurred by him in furtherance of the spiritual and moral welfare and advantage of the parish or of any of the inhabitants thereof, including children and young people, as he may think fit, with power to expend all or any part thereof in payment to curates to serve in the said church and parish. To these proposals the vicar and churchwardens object on the ground that the whole of the income ought as they contend to be applied as proposed with regard to the three fourths, no part being diverted from purposes connected with the church. The overseers on the other hand object to any part of the property being applied for a purely ecclesiastical or spiritual purpose, or towards the discharge of any of the expenses which ordinarily fall to be provided for by the incumbent of an ecclesiastical parish in the ordinary course of his parochial duties or activities.

Before proceeding to consider these objections I ought to mention some further facts. In former times the parish of West Ham was conterminous with the present borough of West Ham, now containing about 300,000 inhabitants. This area is now divided into nineteen ecclesiastical parishes; that served by the ancient parish church (All Saints) contains 25,000 inhabitants.

The question to be determined is, what was the object of the settlor in founding the annual sermon? Did he contemplate and desire to promote what may be conveniently called the secular instruction of the parishioners except so far as that may be involved in religious or moral instruction or exhortation?

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The words are "for or towards the charges of a sermon to be made in the church." I find in the Injunctions of Edward VI. and of Elizabeth that the preaching of sermons is directed as part of the ordinary duty of ecclesiastical persons having the cure of souls. In the Book of Common Prayer in use in 1580 the sponsors of a child are exhorted to see that he hears sermons.

At the present time the word "sermon" has a distinctly religious meaning, and no one would think of applying the term to a lecture on a scientific or literary subject. That it had such a special meaning in 1580 is I think shewn by the documents which I have already mentioned. A sermon then in my opinion was in 1580 and is now a religious discourse; the preaching of sermons and the hearing them was and is now regarded as a religious exercise. I do not mean to say that a sermon did not then or does not now sometimes deal with matters not in themselves directly connected with religion, but I think that such matters in a sermon properly so called are only relevant so far as they illustrate or enforce the religious instruction or exhortation which is the proper object of a sermon. The result is that in my judgment the object of the settlor was distinctly a religious object, and the scheme ought to preserve the religious character of the charity, and no part of the income ought to be applied to any non-religious purpose. This view, if correct, settles the general nature of the scheme and involves the following modifications as matters of principle, namely, first the exclusion from the body of trustees of the mayor of West Ham and the two trustees to be appointed by the borough council, and secondly the omission of clauses 22, 23, and 24 and the substitution therefor of a fresh clause providing for the application to religious purposes of the whole and not merely of three fourths of the available income.

The proposals of the Attorney-General as to that part which was to be applied to religious purposes are contained in clause 24, which is in the following terms. [His Lordship read the clause and proceeded.] Besides the general objection above mentioned, objection to this proposal is taken by the overseers on the ground that it contains no provision requiring the vicar to

account, that the trustees have no voice in determining the mode of application, and that the latter is described in such wide terms that it is possible that objects not charitable in the legal sense might be included. I think there is some foundation for all these objections.

In my opinion the scheme ought to provide for the application of the income by the trustees, though I see no objection to the insertion of a provision empowering the trustees, if in their opinion it shall be convenient so to do, to pay a particular part of the income to the vicar to be by him applied to one or more of the objects to be enumerated, and requiring the vicar in such case to furnish to the trustees at their request in writing a statement of the mode in which it has been applied.

Now as to the objects to which the income should be devoted. The object which in my opinion is nearest to that expressed in the deed is the payment of the stipends of assistant curates.

It is contended that this should be excluded, because it is said it would merely relieve the vicar from a burden which otherwise would fall upon him personally. I do not follow this. There is no obligation on the vicar to provide assistant curates, and though they may and do, of course, relieve the vicar of work which he would have to do himself or leave undone, the real object of the appointment of curates is to ensure the more efficient conduct of the services of the Church and a better provision for the spiritual welfare and religious instruction of the parishioners.

I think, therefore, that the first object to be expressed in the new clause should be, "in or towards the payment of the stipend or stipends of one or more assistant curates to serve in the said church and parish."

As to any money not required for this purpose, I think that it should be applied by the trustees in or towards the expenses incurred by the vicar in providing for the due conduct of the services of the Church or the visitation of the poor or the religious instruction of the parishioners, including children and young persons, with the provisions already mentioned authorizing

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the trustees to pay any particular sum to the vicar for application accordingly.

With regard to minor matters arising on the scheme, I think that the application of the income should be confined to the present parish of All Saints. This is the parish now attached to the church named in the deed, and in the absence of any strong reason to the contrary it is in connection with this church that the income should be applied. So far from there being any reason to the contrary, I think that it would be eminently undesirable to fritter away this comparatively small endowment amongst nineteen parishes and parish churches.

As to the suggestion that provision should be made for the benefit of those who are not members of the Church of England or who do not attend the services of the Church, I think the answer is that by the terms of its foundation this charity is ecclesiastical and attached to the Established Church and its funds ought not to be diverted into other channels. But, in truth, the persons whom I have mentioned are not left without the opportunity of enjoying the benefit of the charity, for the services of the Church are, of course, open to any one who chooses to resort thither, and as to visitation and instruction I have no reason to believe that the clergy or others engaged in these duties confine their ministrations to those who profess themselves members of the Church of England.

As to clause 20 of the draft scheme, which refers to income accrued due prior to the date of the order and since the withholding of the income which had been previously paid to the vicar, I think it only does what is just to Canon Pelly and must stand as it is.

Again as to clause 21 I see no reason why the vicar should not himself preach the sermon and receive the fee of ten guineas for so doing.

I think the provisions contained in clause 25 in the event of the income exceeding 450*l.* are reasonable and proper.

The matter must go back to chambers for the final settlement of the scheme on the lines I have pointed out, and the costs of this adjournment will be costs in the action. No order

will now be drawn up. What I have said is a direction to the Master. He will act on that direction, and the order establishing the scheme will be open to appeal in the ordinary way, and the correctness of this judgment can then be disputed if desired.

Solicitors: *Treasury Solicitor; Mitchell, Lucas & Mitchell; Hillearys.*

A. C.

In re BEETON & CO., LIMITED.

[0092 of 1913.]

Company — Winding-up — Preferential Claims — Director — "Servants" — Articles of Association — Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 209, *sub-s.* 1 (*b*).

The articles of a company that published a weekly periodical provided that no director should be disqualified by his office from contracting with or being employed by the company in the capacity of contributor, editor, or otherwise; and that a director might hold any other office or place under the company in conjunction with his office of director.

R. was a director of the company and was also appointed "dress editress" of the periodical at a fixed salary per annum, and her duties occupied practically the whole of her time. H. was employed by the company at a fixed salary per annum to supply "fashion drawings" for the periodical, and the company had the first call on her services and her work occupied most of her time, but occasionally she did work for other publishers. P. was employed by the company at a fixed salary per annum to supply weekly articles and other information for the periodical, but she also wrote for other publishers. R., H., and P. claimed to be preferential creditors of the company for arrears of salary due to them respectively at the commencement of the winding-up:—

Held, having regard to the articles of the company, that R.'s office of director did not preclude her employment in any other capacity; that she was a "clerk or servant" of the company within the meaning of sub-s. 1 (*b*) of s. 209 of the Companies (Consolidation) Act, 1908, and was therefore entitled to preferential payment.

But *held* that H. and P. were merely contributors to the periodical and not "clerks or servants" of the company within the meaning of the section, and were therefore not entitled to preferential payment.

ADJOURNED SUMMONS.

The above-named company was formed under the Companies Acts in the year 1891 with the object of acquiring the copyright

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in and of carrying on certain periodicals and magazines. The material articles of association were the following :—

Article 3 dealt with the contracts for the sale to the company of certain periodicals and the business connected therewith.

"80. As remuneration for their services the directors shall be paid out of the funds of the company such sums as the company in general meeting shall from time to time direct, and such remuneration shall be divided among them in such proportions and manner as they shall from time to time determine."

"84. No director or intended director shall be disqualified by his office from contracting either as vendor, or otherwise, with or from being employed by the company in any capacity whether as author, contributor, artist, editor, or otherwise, nor shall any such contract, nor any contract or arrangement entered into by or on behalf of the company in which any director shall be in any way interested, be avoided, nor shall any director so contracting, or being so interested, be liable to account to the company for any profit realized by or payment made under any such contract or arrangement by reason of such director holding that office, or of the fiduciary relation thereby established, but such director shall not vote in respect of any such contract or arrangement except as a member, nevertheless this prohibition shall not apply to the agreements referred to in clause 3 hereof, or any matters connected therewith, and further such prohibition may be removed or suspended, wholly or partially, by resolution of a general meeting."

"95. A director may hold any other office or place under the company in conjunction with his office of director, and upon such terms as to remuneration and in all other respects as the directors shall determine."

Article 101 vested in the directors general powers of management with respect to the business of the company.

"102. Without prejudice to the general powers conferred by the last preceding clause, and to the other powers and authorities conferred as aforesaid, it is hereby expressly declared that the directors shall be entrusted with the following powers, namely, power—

. . . . . .

"(*d*) To appoint and at their discretion remove or suspend such managers, secretaries, officers, clerks, agents, and servants for permanent, temporary, or official services as they may from time to time think fit, and to invest them with such powers as they may think expedient, and to determine their duties and fix their salaries or emoluments, and to require security in such instances and to such amount as they think fit."

In June, 1912, the company went into voluntary liquidation, and a liquidator was appointed. Subsequently the debenture-holders of the company authorized the liquidator as their agent to sell the whole undertaking, property, and assets of the company. The amount realized by the sale was insufficient to pay the debentures in full, and there was therefore nothing for the general creditors of the company. But numerous persons in the employ of the company at the date of the winding-up claimed to be preferential creditors of the company, of whom the following were representative cases.

Mrs. Roberts was appointed a director of the company on July 9, 1906, and was thereupon engaged as dress editress of *Hearth and Home*, one of the periodicals published by the company, and the terms of the engagement were contained in the following minutes of the board of directors:—

"10th July, 1906.

"On the termination of Mrs. Peel's services as managing director the board decided on the following temporary arrangements which after full trial will be either confirmed or reconsidered at the termination of three months."

"10th July, 1906.

"Mrs. Roberts to be dress editress of *Hearth and Home* and to supervise *Woman* and *Myra's Journal* illustrations, to recommend to the board the selection of artists, to visit the shops, to supervise fashion artists, to write dress articles and dress correspondence, except diagrams.

"Assistance to be given for double numbers.

"Salary fixed at 312*l.* per annum.

"Postage and travelling expenses allowed."

"9th October, 1906.

"Mrs. Roberts' appointment as dress editress was confirmed

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and it was agreed that the company should pay half the cost of telephone service to Mrs. Roberts."

Mrs. Roberts continued as director and dress editress down to the date when the company went into liquidation, and her salary was at that date four months in arrear.

No remuneration was ever voted to the directors by the company in general meetings, and no directors' fees were ever paid to them.

A Mr. Nolan was the editor of *Hearth and Home* under the company, but Mrs. Roberts had a seat at the office and was subject to supervision. She was one of the permanent staff. Her duties took up practically the whole of her time, and she did no similar work for any other rival paper.

Miss Hatchell entered the service of the company in December, 1904, under a written agreement by which, in consideration of a salary of 200*l.* per annum, payable monthly, she agreed to supply fashion drawings for *Hearth and Home* at a minimum of seventy pages per annum, and not to undertake any other drawing until the work in hand for *Hearth and Home* was completed. Extra pages were to be paid for at the end of the year at the rate of 2*l.* 17*s.* 6*d.* each. The agreement was to run for one year from November 30, 1904, and to be terminable thereafter by either party giving to the other six months' notice in writing. This agreement was varied in March, 1912, by the six months' notice being put an end to, but in all other respects Miss Hatchell continued in the employ of the company on the terms of the agreement of 1904 until the date of the winding up of the company, at which date her salary was two months in arrear.

Under this agreement Miss Hatchell was continually at the call of the company, and it was her duty to postpone all other work which she had until the company's work for the time being on order was fulfilled. The company's work was thus her permanent and regular employment, but at times she did odd work for other printers and shopkeepers. All the work that she did for the company and others was done either at her house or at her studio, and at the date of the liquidation her salary was two months in arrear.

Mrs. Peel was at one time managing director of the company, but resigned that position and severed her connection with the company in July, 1906. Subsequently in October, 1907, she was again engaged by the company under the following minute :—

" 9th October, 1907.

" A vacancy in the Household Management department of *Hearth and Home* having occurred, it was proposed by Mrs. Talbot Coke and seconded by Mrs. Roberts—

" That Mrs. C. E. Peel be engaged to do cookery articles, notices and answers for *Hearth and Home*, the remuneration to be 100*l.* per annum.

" This was agreed to."

Mrs. Peel accepted this engagement, and her duties were to provide a weekly article to occupy a couple of columns, including a menu, and at least one column of " answers to correspondents," more if necessitated by the number of letters received, and such occasional special references to advertisers as might be necessary. She was not required to give her exclusive services to the company, nor to perform her duties at the office of the company. Her engagement continued until the winding up of the company, at which date her salary was four months in arrear. In support of her claim Mrs. Peel deposed that by the terms of her engagement she was a " departmental editress " working under the orders and instructions of the editor, and was not a mere contributor ; and that it was against all journalistic custom to give one's exclusive services to any paper except for a salary very much greater than that paid to her.

The liquidator took out a summons to determine whether these ladies, having regard to the special nature of their services, were to be treated as " clerks or servants " of the company under s. 209, sub-s. 1 (*b*), of the Companies (Consolidation) Act, 1908.

J. W. Holmes, for the liquidator.

F. H. Errington, for Mrs. Roberts. The question is whether Mrs. Roberts was a " servant " of the company within the meaning of s. 209. The minutes of July and October, 1906, constitute a contract of service under which either side would have to give notice if they wished to determine it. The meaning

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of a contract of service is discussed in *Simmons* v. *Heath Laundry Co.* (1) It will be said that she was not in the exclusive service of the company, but the section does not limit the contract of service in any way, and she is not the less a servant of the company because she may have occasionally obtained other work. She practically gave the whole of her time to the company. The secretary of a company may be a clerk or servant: *Cairney* v. *Back*. (2) The nearest case to this is *In re G. H. Morison & Co., Ld.* (3), where an analytical chemist was held to be a servant. The more serious objection is that Mrs. Roberts was a director of the company, and it has been held that a director, qua director, cannot claim to be a servant of a company: *In re Newspaper Proprietary Syndicate, Ld.* (4) But that case does not apply here. Under the articles of this company there is ample power to make a special contract with a director, not qua director, but in another capacity. Therefore Mrs. Roberts was a servant of the company and is entitled to preferential payment.

L. W. Byrne, for Miss Hatchell. The agreement between Miss Hatchell and the directors was a contract of service by virtue of which she was a servant of the company. She was one of the regular members of the staff employed on *Hearth and Home* and not a mere casual contributor, although she sometimes did other work: *Ex parte Chipchase* (5); *In re Stiff* (6); *In re Hutton*. (7) The question of exclusive or non-exclusive employment is not really material.

W. de B. Herbert, for Mrs. Peel, adopted the same line of argument and relied on *In re G. H. Morison & Co., Ld.* (3)

G. F. Kingham, for debenture-holders. The agreements made with these ladies did not make them the servants of the company. The terms of their contract did not require their exclusive services; they could do their work at home and were not obliged to be at the works or the office of the company. Mrs. Roberts was really doing the work of a managing director, and the articles

(1) [1910] 1 K. B. 543.
(2) [1906] 2 K. B. 746, 752.
(3) (1912) 106 L. T. 731.
(4) [1900] 2 Ch. 349.
(5) (1862) 11 W. R. 11.
(6) (1863) 7 L. T. 209, 601.
(7) (1867) 16 W. R. 142.

do not apply. Her case falls within the principle of *In re Newspaper Proprietary Syndicate, Ld.* (1), and in other respects she was a contributor and not a servant. Both Miss Hatchell and Mrs. Peel did their work at home and did not give their exclusive services. They were merely contributors. *In re G. H. Morison & Co., Ld.* (2) is distinguishable. *Cairney* v. *Back* (3) is in my favour. The case most like the present is *Ex parte Butler* (4), where an accountant employed at a fixed salary per annum to keep the books of a company was held not to be a clerk or servant of the company.

NEVILLE J. The first case I have to deal with is that of Mrs. Roberts. She was the dress editress of *Hearth and Home*, and had duties to perform which are enumerated in the minutes of July 10, 1906, and she had a seat in the office which she used when she required to do so. Her duties were rather multifarious and were of a somewhat general nature. I think it is clear that she was not a contributor merely, because she had duties to perform different to that of a contributor, and that so far as she is concerned she was a servant of the company, which was the proprietor of this paper, and that her claim for preferential payment is established. But she was a director of the company, and it has been argued with some force that qua director she certainly cannot be a servant of the company. Authority to that effect has been cited, and it is a conclusion which is fairly obvious. But it seems to me that in the present case the constitution of the company allows of the employment of directors for special purposes and that the fact that she is a director does not prevent her also being a servant within the meaning of the Act. Here there was a special contract with her, outside her office of director, under which she had to perform duties, and although I think it is clear that, qua director, she would have no claim to preferential payment, I am of opinion that in her other capacity as a servant of the company she is entitled to it.

The cases of Miss Hatchell and Mrs. Peel are somewhat

(1) [1900] 2 Ch. 349.
(2) 106 L. T. 731.
(3) [1906] 2 K. B. 746.
(4) (1857) 28 L. T. (O.S.) 375.

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different. Having given the best attention I can to the evidence with regard to their duties and relations to the company, it appears to me that they were in fact merely contributors, although they were paid in the main by salary. I think it would be stretching the words of the section out of reason if I were to say that these two ladies were servants of the company. In their case therefore I think that they are not entitled to preferential payment. With regard to the costs, let Mrs. Roberts' costs of the summons and of her claim up to 50*l.* be paid out of the assets subject to the debentures, and let there be no order as to the other costs of the summons except that the liquidator do pay and retain his costs out of any assets which may come into his hands.

Solicitors for liquidator: *Lydall & Sons.*

Solicitors for respondents: *Morten, Cutler & Co.; Powell & Co.; Ellis, Leathley & Willes; Price & Williams.*

H. L. F.

EVE J. 1913 *June* 26.

PINK *v.* J. A. SHARWOOD & CO., LIMITED.

[1913 P. 589.]

Practice—Discovery—Person of Unsound Mind—Next Friend—Affidavit of Documents—Rules of the Supreme Court, Order XXXI., *rr.* 12, 29.

The next friend of a person of unsound mind cannot be ordered to file an affidavit of documents under Order XXXI., r. 12.

Dyke v. *Stephens* (1885) 30 Ch. D. 189, applied.

Higginson v. *Hall* (1879) 10 Ch. D. 235, not followed.

In an action by a person of unsound mind by a next friend an order was made under Order XXXI., r. 12, that the person of unsound mind by his next friend "and such next friend" should file an affidavit of documents, and the next friend filed an affidavit accordingly, and the defendants then applied for a further and better affidavit:—

Held that, the order having been made without jurisdiction, the Court could refuse the application without first setting aside the order.

PROCEDURE SUMMONS.

The plaintiff, a person of unsound mind not found lunatic by inquisition, sued in the action by Joseph Moore, his next friend,

who had been appointed receiver under s. 116 of the Lunacy Act, 1890, for an injunction to restrain infringement of a right in a trade name and labels.

On the defendants' application an order was made under Order xxxi., r. 12, on May 19, 1913, "that the plaintiff by Joseph Moore his next friend and such next friend" should file an affidavit of documents.

Moore having filed an affidavit, the defendants took out this summons for a further and better affidavit.

E. Clayton, K.C., and *T. J. C. Tomlin*, for the summons. This is a proper case for a further and better affidavit: *British Association of Glass Bottle Manufacturers, Ld.* v. *Nettlefold* (1); *Jones* v. *Monte Video Gas Co.* (2)

P. O. Lawrence, K.C., and *P. S. Stokes*, for the plaintiff. No order for discovery ought ever to have been made. Order xxxi. applied originally to neither infants nor lunatics—*Dyke* v. *Stephens* (3); *Mayor* v. *Collins* (4); *Curtis* v. *Munday* (5)—but was after those decisions extended to infants by the addition of r. 29 in 1893. It was not, and has never been, extended to lunatics, because in their case the Court has possession of the documents, and any person who can satisfy the Court that he is reasonably entitled will be allowed inspection: *In re Wood* (6); *In re Strachan.* (7) The order of May 19 was submitted to by the plaintiff under a misapprehension. It is open to him now to shew that it ought never to have been made. That being so, the present application should be dismissed with costs.

E. Clayton, K.C., in reply. The order of May 19 has been made and is unappealable here. This summons is merely a step in the enforcement of that order, and is not a step to make a fresh order. To ask for a further and better affidavit on the ground that the first affidavit has not disclosed all the documents is merely to ask to have the order carried out. The plaintiff cannot be heard to say that it cannot be complied

(1) [1912] A. C. 709.
(2) (1880) 5 Q. B. D. 556.
(3) 30 Ch. D. 189.
(4) (1890) 24 Q. B. D. 361.
(5) [1892] 2 Q. B. 178.
(6) (1863) 4 D. J. & S. 134.
(7) [1895] 1 Ch. 439.

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with because it ought never to have been made. The Court has no discretion whether or not it shall enforce the order; its only discretion is as to the way in which it shall enforce it. It cannot take into consideration the question whether it was validly made. But it was validly made: *Higginson* v. *Hall.* (1) That case is precisely in point. Subsequently Pearson J. held in *Dyke* v. *Stephens* (2) that the next friend of an infant could not make the affidavit because he was not a party, and r. 29 was then added to Order xxxi. to meet that. But there was no need to make the rule extend to the next friend of a lunatic, because there was already existing the decision of Malins V.-C. in *Higginson* v. *Hall* (1) that a lunatic's next friend could make the affidavit. The plaintiff cannot go behind the order of May 19 as it stands. If he wishes to set it aside he must apply to have it discharged.

The plaintiff cannot say the documents are not in the next friend's possession, but in the possession of the Court, in the face of the evidence to the contrary.

EVE J.. In this action the plaintiff, a person of unsound mind not so found by inquisition, sues by Joseph Moore his next friend. Moore had been appointed receiver under s. 116 of the Lunacy Act, 1890, some time prior to the issue of the writ. The claim made in the action is for an injunction to restrain an alleged infringement of the plaintiff's right of property in a certain trade name and the labels used in connection with a business formerly carried on by him. The action has proceeded up to delivery of the defence.

On May 19, upon the application of the defendants, an order was made "that the plaintiff by the said Joseph Moore his next friend and such next friend do within seven days after service of this order make and file a full and sufficient affidavit stating whether the plaintiff has or has had in his possession or power any and (if any) what documents relating to the matters in question in this action and accounting for the same." Pursuant to that order, an affidavit was filed by Moore which for the purposes of the present application I will assume to be an insufficient

(1) 10 Ch. D. 235. (2) 30 Ch. D. 189.

affidavit. On that assumption the order was not complied with, and it was therefore open to the defendants to proceed, under r. 21 of Order xxxi., for an order of attachment, or for an order striking out the statement of claim and dismissing the action, or under r. 19A for an order for an affidavit as to specific documents, or, as yet another alternative, for an order that the plaintiff should comply with the order of May 19 by filing a further and better affidavit. The defendants have selected the last alternative and have issued a summons for an order "that the plaintiff by the said Joseph Moore his next friend do file a further and better affidavit of documents upon the ground that the plaintiff has not disclosed the documents enumerated in the schedule." Objection is now taken on behalf of the plaintiff to any order being made on this application on the ground that the order of May 19 itself ought not to have been made. The first question therefore which I have to consider is whether that order was properly made.

It was made under r. 12 of Order xxxi., which provides that "any party may, without filing any affidavit, apply to the court or a judge for an order directing any other party to any cause or matter to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question therein." The first observation which arises on reading the rule is that the person who has been directed in this case to make the discovery is not a party to the action. Persons under disability, that is to say, infants, persons of unsound mind and lunatics, can only commence an action by a next friend or committee. In the case of a lunatic the committee and lunatic are both made parties, but this is not so where an infant or a person of unsound mind sues by a next friend and the next friend is not a party to the action. It was on this ground that Pearson J. decided in *Dyke* v. *Stephens* (1) that in an action brought by an infant by a next friend there was no jurisdiction to order discovery by the next friend. In coming to that conclusion Pearson J. had to consider the decision of Malins V.-C. in *Higginson* v. *Hall* (2), where, in an action by a person of unsound mind suing by his

(1) 30 Ch. D. 189. (2) 10 Ch. D. 235.

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next friend, counsel for the person of unsound mind not disputing that there must be discovery of documents but expressing a doubt as to who should make the affidavit, the next friend not being "a party," the Vice-Chancellor held "on broad principles" that the next friend was the proper person to make the affidavit. I think it is clear that the conclusions of Pearson J. and the Vice-Chancellor cannot both be right, and, in these circumstances, which ought I to follow? I prefer the later decision of Pearson J.; it negatives the suggestion that a rule, by which power is given to order discovery by a party to the action, can be resorted to for the purpose of compelling discovery by a person who is not a party. Since Pearson J.'s decision r. 29 has been added to Order XXXI., and the whole Order now applies to infant plaintiffs and defendants and their next friends and guardians. The fact that the added rule is confined to these persons no doubt affords some ground for Mr. Clayton's observation that this course was probably adopted because there was no need to provide for the case of a plaintiff of unsound mind suing by a next friend, seeing that the Vice-Chancellor had already decided that in such a case the next friend could be ordered to make discovery, but I think the Rule Committee must have appreciated that the decisions in *Higginson* v. *Hall* (1) and *Dyke* v. *Stephens* (2) could not be reconciled and that other reasons than the decision in the former case must have existed for not extending r. 29 to the next friend of a person of unsound mind. Among such reasons may be the fact that one result which follows on the appointment of a receiver or committee is that the property of the person of unsound mind thereupon passes into the control of the Lords Justices, and thereafter it is for them to determine the extent to which, and the circumstances in which, documents belonging to, or in the possession of, or relating to, the person of unsound mind are to be disclosed to, and inspected by, persons seeking discovery. There being already means of obtaining discovery in lunacy, it may well have been considered that it was neither necessary nor desirable to add to them by extending Order XXXI. to persons of unsound mind and their next friends. But, whatever be the

(1) 10 Ch. D. 235. (2) 30 Ch. D. 189.

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reason, the Order in my opinion does not include them, and on this ground I come to the conclusion that there was no jurisdiction to make the order of May 19. If the present application were to enforce compliance with that order by writ of attachment or dismissal of the action, I should feel bound to direct the matter to stand over in order to give the plaintiff an opportunity of moving to discharge the order, but on this application for a further and better affidavit I can deal with the matter, without first setting aside the order of May 19, by refusing the application for a further affidavit, if I think the first order ought not to have been made. I do think so, and having come to that conclusion I dismiss the present application.

Solicitors: *Billing & Co.; Parker, Garrett & Co.*

A. L.

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In re NEUCHATEL ASPHALTE COMPANY'S TRADE MARK.

Trade Mark—Application for Registration—Mark not presently intended for Use in Connection with Goods in the United Kingdom—Appeal from Comptroller-General—Grounds of Objection—Trade Marks Act, 1905 (5 *Edw.* 7, *c.* 15), *ss.* 3, 12.

A trade mark, to be within the definition in s. 3 of the Trade Marks Act, 1905, must be one which is used or proposed presently to be used in connection with goods of the owner of the mark dealt with by him in the United Kingdom.

The N. Company, which had in a canton of Switzerland the sole concession for working certain asphalte mines and had a trade mark there, was bound by agreement with an English company, the V. de T. Company, to supply the latter with all asphalte which it required for the United Kingdom and not to supply asphalte to any other person in the United Kingdom; and the agreement was to endure until 1926. The V. de T. Company had registered in England a trade mark in connection with the asphalte sold by it. The asphalte supplied by the N. Company was delivered in Switzerland to the V. de T. Company:—

Held, that the N. Company was not entitled to register a trade mark in England in respect of its asphalte during the continuance of the agreement.

On an appeal under s. 12 of the Trade Marks Act, 1905, from the refusal of the Comptroller-General to allow an application for registration of a trade mark to proceed, an opponent to registration who

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was not before the Comptroller-General but has been brought in for convenience on the appeal is not confined to the objections which have been relied on by the Comptroller-General.

THE Neuchatel Asphalte Company, Limited, were the holders of the sole concession from the Government of the canton of Neuchatel, in Switzerland, for working the asphalte mines of the Val de Travers in that canton.

Under certain agreements, continued from time to time, between the Neuchatel Company and the Val de Travers Asphalte Paving Company, Limited, the latter company had the exclusive right to take all the asphalte which the Neuchatel Company supplied for the United Kingdom, the latter company being bound not to supply asphalte to any one in the United Kingdom except the Val de Travers Company.

The operation of the existing agreement (which is more particularly referred to in the judgment of Sargant J.) was to endure until November 15, 1925.

The Val de Travers Company were also, under the agreement, entitled to the exclusive supply of a preparation called "mastic," but had not so far claimed any supply of this preparation.

The Val de Travers Company took all deliveries of asphalte from the Neuchatel Company in Switzerland, and were supplied with and sold asphalte which came from other sources than the Neuchatel Company. The question whether the Val de Travers Company had the right to sell the lastly mentioned asphalte as Val de Travers asphalte, or under a similar name, was, at the date of the application below mentioned, the subject of an action brought against them by the Neuchatel Company.

The Val de Travers Company had a trade mark, registered in England, in respect of their goods, consisting of the words "Val de Travers" and the word "London" in a square, and having between those words, in a sort of pentagon, the letters "V. T." and a symbol representing something more like a dagger than a cross.

The Neuchatel Company had had for some time a trade mark in respect of their goods which was registered in Switzerland and also as an international mark, but the United Kingdom was no party to the arrangement as to international marks.

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The Neuchatel Company applied to the Comptroller-General of Patents, Designs, and Trade Marks (who, by s. 4 of the Trade Marks Act, 1905, "is in this Act referred to as the Registrar") for registration in class 4, in respect of asphalte, of their mark, which consisted of the words "Val de Travers Etat" round a sort of cross, with the initials "V. T." twice repeated between the cross and the surrounding words. They made no claim to the exclusive use of the letters "V. T." or to the name "Val de Travers," and they undertook not to use the cross in red.

The Comptroller-General, or Registrar, refused the application. In doing so he stated that there was already on the register a trade mark in respect of asphalte containing the disclaimed "Val de Travers" and "V. T.," though not the word "Etat," with a device which if looked at from one direction was a cross, but if looked at in the ordinary way was, and was intended to be, a dagger, and that, in his view, the applicants' mark was likely to lead to confusion, as both the marks would tend to cause the asphalte to be sold as "Cross Brand" asphalte. He therefore refused to allow the application to proceed, as he was not satisfied that the mark was not "calculated to deceive."

The applicants appealed from this refusal to the Court, and served their notice of motion by way of appeal on the Val de Travers Company, who had not been heard before the Comptroller-General, and on the Comptroller-General.

Colefax, K.C., and *Fischer Williams*, in support of the appeal. The Val de Travers Company were not before the Comptroller-General and have been served in accordance with the practice laid down in *In re Royal Worcester Corset Co.'s Application.* (1) The opponents say that we are not entitled to register our mark because while the agreement between us exists we cannot sell our goods in this country; but that point was not considered by the Comptroller-General.

The grounds stated by the Registrar are insufficient. There was no evidence that the opponents' mark had ever been known as the "Cross Brand," although in Australia it has been known as the "Dagger Brand." The applicants are manufacturers, or

(1) [1909] 1 Ch. 459.

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in the position of manufacturers; they are using their present trade mark all over the world, and ought to be able to put on their goods a mark which will shew their origin.

[SARGANT J. You can do that without having a registered trade mark.]

That would not avail us much if somebody else could put on his mark. It is immaterial that we cannot at present sell our goods in this country. Sect. 3 of the Trade Marks Act, 1905, defines a trade mark as meaning not only a mark "used" but also a mark "proposed to be used upon or in connexion with goods for the purpose of indicating that they are the goods of the proprietor of such trade mark by virtue of manufacture, selection, certification, dealing with, or offering for sale." We propose to sell the goods here when we are unfettered by agreement. The section does not mean "propose to sell forthwith," but when opportunity permits. Sect. 37 of the Act gives a remedy by taking a mark off the register in the case of non-user in connection with the goods. This case is not like *In re Batt & Co.'s Trade Marks* (1), for there the mark was registered without any bona fide intention to use it. The registration of the mark cannot in any way injure the public.

[SARGANT J. referred to s. 22 of the Act.]

Austen-Cartmell, for the Comptroller-General. The appeal is, under s. 12 of the Act, by the applicants for registration, and not under s. 14; and the opponents, if entitled to be heard, can only rely on the ground taken by the Comptroller-General.

Martelli, K.C., and *Parton*, for the Val de Travers Company. We are entitled not only to rely on the ground stated by the Comptroller-General, but to raise any other objection to the registration. The Neuchatel Company, being unable to sell their goods in this country, will not suffer by being unable to register their mark here. Although not registered themselves, they can oppose the registration of any one else's mark if they think it will injure them: *In re Rivière's Trade Mark*. (2)

The real objection to registration is that the mark is not a trade mark, because it is not "used or proposed to be used upon

(1) [1898] 2 Ch. 432. (2) (1884) 26 Ch. D. 48.

or in connexion with goods," within a reasonable time, in this country. The goods cannot be sold in this country and are not goods which are intended to be protected by registration in this country.

Sect. 9 defines a registrable trade mark as consisting of at least one of several essential particulars, including "any other distinctive mark," and the same section says that "'distinctive' shall mean adapted to distinguish the goods of the proprietor of the trade mark from those of other persons." This mark is certainly not distinctive.

Sect. 19 of the Act prohibits registration of a mark in respect of any goods which is identical with one of another proprietor, already on the register with respect to such goods, "or so nearly resembling such a trade mark as to be calculated to deceive." The onus of shewing that the mark is not calculated to deceive lies on the applicants for registration: *Eno* v. *Dunn*. (1) The applicants in the present case have not discharged that onus. [They also referred to *Philippart* v. *William Whiteley, Ld.* (2)]

Colefax, K.C., in reply.

[Reference was also made to *In re Itala Fabbrica di Automobili*. (3)]

SARGANT J. This is an appeal, under s. 12 of the Trade Marks Act, 1905, from a refusal by the Comptroller-General to proceed with the registration of a mark which is proposed to be registered by the Neuchatel Asphalte Company, consisting of the words "Val de Travers Etat" round a sort of Maltese cross or peculiar cross, with the initials "V. T." twice repeated between the cross and the surrounding words. The Comptroller-General refused, independently of any opposition, because of the existence on the register already of a trade mark belonging to a company which I will call the Val de Travers Company, consisting of the words "Val de Travers" and the word "London" in a square and having between those words a curious sort of pentagon with the letters "V. T." and a symbol which is more like a

(1) (1890) 15 App. Cas. 252, 257. (2) [1908] 2 Ch. 274.
(3) (1910) 27 Rep. Pat. Cas. 493.

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dagger than a cross and which must be inverted if it is to be considered as a cross.

The Comptroller-General gave his grounds for refusal. After describing the two marks and referring to the disclaimer he said: "It appears to me that the result may be that the applicants' mark may lead to misconception, because both of the marks would tend to cause asphalte to be sold as 'Cross Brand.' That being so, the mark ought not to proceed, as I am not satisfied that it is not calculated to deceive."

On the appeal, in accordance with what has been found to be a convenient practice, the notice of appeal was served on the Val de Travers Company, and they appear and oppose, not only on the ground that the two marks are so much alike that they may tend to cause deception, but also on the ground that the applicants have no trade or business in this country, so that practically the mark which they propose to register does not come within the definition in s. 3 of the Trade Marks Act, because it is not "a mark used or proposed to be used upon or in connexion with goods for the purpose of indicating that they are the goods of the proprietor of such trade mark by virtue of manufacture, selection, certification, dealing with, or offering for sale."

Those two grounds of opposition are completely different, and it was suggested on behalf of the Comptroller-General that I ought to limit myself to the ground taken by him and ought not to deal with the further ground that is now put forward by the opponents, the Val de Travers Company; but I think that would be a very inconvenient course to adopt. The opponents are here, and both they and the applicants desire to have the matter decided by me at the present time. It is quite true that any decision which I may give will not in any way bind the Comptroller-General should it happen that, as a result of opposition, he comes to the conclusion, after advertisement, that the mark ought not to be registered, but probably my decision would not bind him even as regards the ground of objection which he took originally; he may come to a different conclusion after such evidence as may be put before him. But in either case it seems to me that what I say may be of value to him in coming to a conclusion, and that he would pay attention

to it. Certainly this beneficial practice, which in many cases saves costs, of allowing a particular opponent to be heard at the initial stage, and not waiting until advertisements have been issued, would be deprived of half its value if the particular opponent, when he was brought before the Court at this preliminary stage, were to be limited to the precise grounds of objection that had been taken by the Comptroller-General. I may point out this too, that under s. 12, sub-s. 5, the only person who is limited to the grounds of decision given by the Comptroller-General—who in the Act is referred to as the Registrar—is the Registrar himself. It seems to me that, both parties consenting and desiring that I should determine the matter on both the grounds of opposition, I am justified in so doing, and I propose to do so.

As regards the point taken by the Comptroller-General, whether it is necessary to determine it now or not, I think I had better express my views on it. I should not agree with the Comptroller-General. I think this is to be noted—that, with his great experience in these matters, it has not occurred to him that the marks, as they strike the eye as they appear on paper, are liable to cause confusion at all. That is not the ground of his decision. If he had thought that the two trade marks, as they strike the eye, were too much alike, I think he would have said so. From his silence on that matter I think I can clearly come to the conclusion that he was of opinion that there was nothing in the visual representation or the visual appearance of these two marks to create any confusion. Certainly, that would be the view which I should take myself, looking at them as an ordinary member of the public. The mere fact, again, that the words "Val de Travers" occur in both marks does not seem to me to be any reason for refusing the second mark, because I think the words "Val de Travers" are to a large extent words of description, and it would be extremely strong for me to come to the conclusion, at any rate at this stage, that any sort of monopoly was acquired in the words "Val de Travers" by the Val de Travers Company, when those words appear to be merely words of geographical description. Of course, it may be possible—I am not prejudicing anything that may be proved in the passing-off action which

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I understand is pending between the parties—for the Val de Travers Company to shew that the words "Val de Travers" have acquired a secondary meaning, and denote goods that have passed through their hands and have come before the public through their certification as it were. That is an entirely different matter, but nothing of that sort has been put forward in the evidence on this application, and, that being so, I do not think that the identity of those words, "Val de Travers," would be a sufficient reason for refusing the application.

The ground put forward by the Comptroller-General is, that there might be misconception because both of the marks would tend to cause the asphalte to be sold as "Cross Brand." Well, the "Val de Travers" mark has been used, as I understand, for something like thirty or forty years in this country, and there is no suggestion that it ever has, in fact, come to be known anywhere as the "Cross Brand." There is some slight evidence that it has been occasionally called the "Dagger Brand," but in any case I think that that suggestion is rather too hypothetical and problematical, and if one were to indulge in speculation of that sort, traders might find it almost impossible to get any trade mark registered. I think, therefore, that if I had to decide the matter with reference to the first ground alone—the ground taken by the Comptroller-General—I should direct that the mark proceed.

Then comes a much more serious objection, founded on the particular facts in this case, which necessarily could not come before the Comptroller-General until the opponents were heard. That objection is that the Neuchatel Company have never had any trade or business in this country with reference to the goods in respect of which they desire to register the trade mark. It appears that both companies have been in existence for a great number of years,—I think the Val de Travers Company was incorporated in 1871, and the Neuchatel Company in 1873—and throughout the whole existence of the Neuchatel Company there never has been any sale by it directly of any asphalte in this country. The Val de Travers Company have throughout been the sole concessionaires, and they have taken the whole of the output of the Neuchatel Company, and during the currency of

the existing agreement—which is dated 1907 and will endure until 1926—and also, I am told, during all the previous agreements, although there has been power during the present agreement and the last previous agreement for the Val de Travers Company to sell other asphalte in this country, there has been no power whatever for the Neuchatel Company to supply or use asphalte in this country except through the Val de Travers Company, and the Val de Travers Company take delivery of the asphalte in Switzerland.

The clause which debars the Neuchatel Company is clause 4 of the first agreement and is in these terms: "The Neuchatel Company shall not, during the operation of this agreement, supply any person, firm or corporation, other than the Val de Travers Company, with any rock or mastic"—I will say something later as to mastic—"referred to in clause 3, nor with any rock or mastic being the produce of any mines belonging to the Neuchatel Company or in which that company is interested, for use, to the knowledge of the Neuchatel Company, at any place within the United Kingdom of Great Britain and Ireland, and the Neuchatel Company shall not itself use or permit the use of any such rock or mastic in any part of the said United Kingdom, but shall, so far as may be practicable, make over and transfer to the Val de Travers Company all orders for the supply of such rock or mastic within the said United Kingdom which the Neuchatel Company may receive, and will by all means legally available to them prevent such sales to or user by other parties." All the asphalte that has in fact been sold by the Val de Travers Company or that has come from the Neuchatel Company into this country has been sold under the brand, as I understand it, so far as a brand is used at all, of the Val de Travers Company.

As far as the asphalte itself is concerned, it is delivered, just as it is got from the mines, into trucks, and no trade mark of any kind at all is put upon it. Therefore it is extremely difficult to see how there can be said to be any trade or business of the Neuchatel Company in respect of which any trade mark can possibly have been used in this country, or can be used down to the end of the year 1925. It is true the asphalte comes from them,

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but the asphalte necessarily has not on it any distinguishing mark. The persons who purchase asphalte in this country buy it from the Val de Travers Company. This is not like the Chartreuse case, or any case of that kind. In that case, *Rey* v. *Lecouturier* (1), the liqueur which was supplied by the monks to the sole consignee was sold by him in this country in bottles bearing the trade mark of the Chartreuse fathers. The trade mark got known in this country as something denoting goods manufactured by the Chartreuse fathers, and none the less because the persons who were supplying the goods in this country were merely the sole concessionaires. Here there is nothing at all of that kind. As far as I can see, there never has been, or could be, or will be, down to the year 1926, so long as the Val de Travers Company oppose it, any sale whatever of any asphalte in this country in connection with any trade mark of the Neuchatel Company.

The case is not precisely the same with regard to the mastic. I am told that at present no mastic is being taken by the Val de Travers Company, but that mastic, which is prepared from asphalte, is sold in disc-like blocks of about half a hundredweight each. The Neuchatel Company say that, should the Val de Travers Company order any mastic from them, they would supply them, of course not in England but in Switzerland, with blocks of mastic which would bear the trade mark of the Neuchatel Company, and that if the Val de Travers Company did not obliterate that mark—a step which they would be fully entitled to take if they thought fit—the result would be that these blocks of mastic would be sold in this country with the Neuchatel Company's trade mark on them, and that then there would be a user of that trade mark in this country. They say, "We should wish to do that, and we should propose to do it, but for our contractual obligations with the Val de Travers Company. Therefore this trade mark, at any rate so far as mastic is concerned, is 'a mark used or proposed to be used upon or in connexion with' our blocks of mastic." It seems to me that to distinguish the case of mastic from that of asphalte would be too hypothetical and problematical, and I propose, therefore, to deal with the case

(1) [1908] 2 Ch. 715, affirmed sub nom. *Lecouturier* v. *Rey* [1910] A. C. 262.

mainly as if it were a case merely with regard to asphalte, although I recognize that there is a slight difference with regard to mastic if mastic were taken.

The question really is, What is the meaning of the words "used or proposed to be used upon or in connexion with goods" in s. 3 of the Trade Marks Act? Mr. Colefax has not contended that the mark proposed to be registered is one which is used in this country in connection with the goods, but he says that it is sufficient that it is used in connection with the goods in foreign countries. The Neuchatel Company have, as I understand, got their trade mark registered as an international trade mark, and therefore it may be said to be used, in a sense, all over the world in connection with their goods; but I think that the word "used" in s. 3 of the Act must mean "used in this country," and Mr. Colefax has to admit that the mark is not used in this country in connection with this asphalte.

Then is it proposed to use the mark in this country in connection with the goods of the applicants? Here there is some authority, and the principal case is that of *In re Batt & Co.'s Trade Marks*. (1) That was not a case of application for registration, but for removal of the mark from the register, and it was found, as a fact, that the owner of the mark had put it on the register, not really with the view to any bona fide trade, but for the purpose of obstruction, in order to prevent other persons being registered in respect of their marks. That was a case in which the circumstances were very much more adverse to the owner of the trade mark than are those of the present case. For many reasons I wish that I could find that the applicants, who have got their mark registered all over the world, were entitled to have it registered here, but in *In re Batt & Co.'s Trade Marks* (2) Lindley M.R. in delivering the judgment of the Court of Appeal said—and I think it is conceded that the old legislation was, on this point, the same as the present legislation—"A question of law then arises which may be stated shortly as follows:—Can a man properly register a trade mark for goods in which he does not deal or intend to deal?"—that must mean "deal or intend to deal in this country"—"meaning by intending to deal having

(1) [1898] 2 Ch. 432. (2) [1898] 2 Ch. 439.

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at the time of registration some definite and present intention to deal in certain goods or descriptions of goods, and not a mere general intention of extending his business at some future time to anything which he may think desirable. This question we answer in the negative." I have to consider whether there is, within the meaning of Lindley M.R.'s observations, a present intention on the part of the Neuchatel Company to deal, or a present proposal to use, following the words of s. 3. Applying this test I am constrained to say that there is not a present intention to deal, though I think there is a desire to deal, if and so far as the Val de Travers Company do not prevent it, with the goods under this trade mark. I think it may well be that in the year 1926 steps will be taken by the Neuchatel Company to deal with the goods in that way, but that seems to me to be too far off and too remote.

Lord Halsbury pointed out in an interlocutory observation in *Batt's Case*, when in the House of Lords (1), which does not appear in the report in the *Law Reports* but does appear in another report (2), that "the Trade Mark Acts are not for copyright in marks, they are to protect trade marks. If you have no goods you are claiming only copyright, you are not claiming for the purpose of protecting your trade." I think also that there are indications all through the Trade Marks Act, 1905, that what is to be protected is trade or business in goods. Not only is there the definition in s. 3 which I have referred to, but there is the very important provision in s. 22 that "A trade mark when registered shall be assigned and transmitted only in connexion with the goodwill of the business concerned in the goods for which it has been registered." There are also the words of s. 37, providing that a trade mark may be taken off the register where, amongst other things, there has been no bona fide user of the mark in connection with the goods in respect of which it was registered during the five years immediately preceding the application. Here, although the goods of the applicants have in fact been sold in this country, they do not seem to me to have been sold in any way in connection with any trade or business belonging to the

(1) *John Batt & Co.* v. *Dunnett* [1899] A. C. 428.

(2) 16 Rep. Pat. Cas. 411, 413.

applicants, or in such a way as to create a trade or business on their behalf, or a goodwill in any trade or business which is protected under the Trade Marks Act.

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I am compelled, for these reasons, to refuse the application, and I refuse it with costs. I think the costs must include the costs of the Comptroller-General. There was a claim by him, which I have not to deal with here, but which was acceded to by the applicants, as to the form of disclaimer proposed to be given.

Solicitors for applicants: *Bischoff, Coxe, Bompas & Bischoff.*

Solicitors for opponents: *Drake, Son & Parton.*

Solicitor for Comptroller-General: *Solicitor to the Board of Trade.*

F. E.

Considered. WESTMINSTER CITY COUNCIL *v.* HASTE. [1950] 2 All E.R. 65.

Applied. WESTMINSTER CORPN. *v.* HASTE [1950] 1 Ch. 442

WOODS *v.* WINSKILL.

[1913 W. 198.]

ASTBURY J. 1913 *June* 10, 13, 16, 26.

Company—Receiver and Manager—Appointment by Debenture-holders—Notice of Preferential Claim—Subsequent Payments to Ordinary Creditors in carrying on Business—Loss of Assets—Liability to Preferential Creditor—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 107.

A receiver and manager appointed by debenture-holders, who, after notice of any claim that is preferential under s. 107 of the Companies (Consolidation) Act, 1908, pays away the company's assets to ordinary creditors in the process of carrying on the company's business without making or attempting to make any provision for that preferential claim, is guilty of a breach of that section and is liable in damages accordingly.

WITNESS ACTION.

On December 23, 1911, the plaintiff's husband, an employee of Stone-Ground Limited, who were stone-ground flour bakers, met with a fatal accident arising out of and in the course of his employment and died on December 25, 1911.

On February 6, 1912, the plaintiff's brother gave the company formal notice of the accident and death and stated that the amount of compensation payable to her under the Workmen's Compensation Act, 1906, was 234*l.*

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On February 15, 1912, the defendant and Mead, who between them held a majority of the company's debentures the principal of which had become payable, appointed the defendant receiver and manager of the assets and business. This appointment was made under a condition in the debentures which provided that the receiver should have all the powers conferred by the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), upon a receiver appointed under that Act, and should in addition have power to take possession of the property charged and carry on therewith the business of the company, appointing and employing managers, servants, and agents and fixing and paying their remuneration, and also power to sell the property, and so that the receiver should be the agent of the company, who should alone be responsible for his acts and defaults.

On February 16, 1912, the plaintiff's brother again wrote to the company pressing her claim.

On February 19, 1912, the defendant took possession as receiver and manager and (as the Court held) with knowledge of the plaintiff's claim acquired on or before February 17, 1912.

At this date the company's assets consisted of 61*l.*, including 30*l.* book debts and 27*l.* unpaid calls on the shares of H. M. Hyndman.

Another debenture-holder, Edgcome, was then managing director at a salary of five guineas a week. He was desirous of having the company's business continued in the hope of raising fresh capital and he was largely instrumental in obtaining the defendant's appointment. Subsequent to this appointment he continued in fact to manage and direct the concerns of the company as before. The defendant acquiesced in his so acting, and with the defendant's concurrence the assets were applied in carrying on the business in lieu of providing for the plaintiff's claim.

On February 28, 1912, Edgcome, who had informed the plaintiff that a receiver was in possession, advised her to do nothing and wait a little.

On March 23, 1912, the plaintiff's brother gave the defendant direct notice of the plaintiff's claim for 234*l.* and pointed out that it was a preferential claim.

On April 1, 1912, the plaintiff applied for an arbitration, and on May 14, 1912, she was awarded 234*l.* and costs (afterwards taxed at 22*l.*) in the Bloomsbury County Court.

On May 29, 1912, the plaintiff's solicitors gave the defendant formal notice of the award, and pointed out that it was a preferential claim, and on May 31, 1912, they gave a similar notice to the company.

On July 20, 1912, a transfer of Hyndman's shares to Edgcome was passed at a board meeting at which the defendant was present. The 27*l.* call was still unpaid. The defendant did not, however, obtain payment of this call, but allowed Edgcome to set it off against his salary, which was credited to him in the books at five guineas a week, though his actual drawings were less than half that amount.

On November 12, 1912, the company was wound up on the plaintiff's petition, and on March 20, 1913, the defendant went out of possession, having carried on the company's business or allowed Edgcome to do so until that date without making any attempt to meet any part of the plaintiff's claim, which was in fact preferential to the extent of 100*l.*

The defendant's statutory accounts of his receipts and payments from the date of his appointment up to August 17, 1912, and from that date up to March 20, 1913, shewed that the business had been carried on at a loss exceeding the amount or value of the assets at the date of his appointment. There had never been any profits, and no payment had been made to the debenture-holders.

In this action, commenced on January 23, 1913, the plaintiff complained that the defendant in breach of his statutory duty under s. 107 of the Companies (Consolidation) Act, 1908, had applied the company's assets in payment of ordinary creditors without providing for her preferential claim of 100*l.*, and claimed damages accordingly.

The payments complained of were made after the defendant's appointment as receiver and manager and before the winding-up. The evidence was conflicting, but the Court held that the plaintiff had established the following points:—

(1.) The 30*l.* book debts were received and largely applied by

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the defendant or Edgcome in making payments to ordinary creditors in the course of carrying on the company's business.

(2.) 49*l.* rent was paid on September 30, 1912.

(3.) Edgcome was permitted to set off his 27*l.* liability on the shares transferred to him by Hyndman against his own salary and had further received 36*l.* out of the company's assets on account of his salary. This made a total payment to him of 63*l.* in cash or account. As against this, however, Edgcome from time to time during the receivership period advanced moneys amounting in all to 42*l.* to enable the business to be carried on.

(4.) The defendant knew of the plaintiff's claim on or prior to February 17, 1912.

H. H. Daw, for the plaintiff. The plaintiff's claim is preferential to the extent of 100*l.* under s. 5, sub-s. 3, of the Workmen's Compensation Act, 1906, and ss. 107 and 209 of the Companies (Consolidation) Act, 1908. (1)

(1) Sect. 5, sub-s. 3, of the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), provides that there shall be included among the debts which under s. 1 of the Preferential Payments in Bankruptcy Act, 1888 (51 & 52 Vict. c. 62), are in the distribution of the assets of a company being wound up to be paid in priority to all other debts, the amount, not exceeding in any individual case 100*l.*, due in respect of any compensation the liability wherefor accrued before the date of the commencement of the winding-up.

Sub-s. 6 provides that this section shall not apply where a company is wound up voluntarily merely for the purposes of reconstruction or of amalgamation with another company.

Sect. 107 of the Companies (Consolidation) Act, 1908, provides as follows:

Sub-s. 1. "Where, in the case of a company registered in England or Ireland, either a receiver is appointed on behalf of the holders of any debentures of the company secured by a floating charge, or possession is taken by or on behalf of those debenture-holders of any property comprised in or subject to the charge, then, if the company is not at the time in course of being wound up, the debts which in every winding-up are under the provisions of Part IV. of this Act relating to preferential payments to be paid in priority to all other debts, shall be paid forthwith out of any assets coming to the hands of the receiver or other person taking possession as aforesaid in priority to any claim for principal or interest in respect of the debentures."

Sub-s. 2. "The periods of time mentioned in the said provisions of Part IV. of this Act shall be reckoned from the date of the appointment of the receiver or of

The defendant has broken his statutory duty to the plaintiff under s. 107 and is therefore liable in damages: *Groves* v. *Lord Wimborne*. (1)

Sect. 107 requires that the plaintiff's preferential claim "shall be paid forthwith out of any assets coming to the hands of the receiver."

[ASTBURY J. The section goes on "in priority to any claim for principal or interest in respect of the debentures." Does it do more than give you priority over the debentures?]

That construction gives no meaning to the word "forthwith." Sect. 107 merely replaces s. 3 of the Preferential Payments in Bankruptcy Amendment Act, 1897 (60 & 61 Vict. c. 19), which was repealed by the Companies (Consolidation) Act, 1908. The 1897 Act provided that the preferential claim "shall be paid forthwith out of any assets coming to the hands of the receiver . . . . in priority to any claim for principal or interest in respect of such debentures," and in cases subsequent to that Act the common form order appointing a receiver in a debenture-holder's action provided that the receiver do "forthwith," out of any assets coming to his hands, pay "the debts of the company which have priority over the claims of the debenture-holders" under the Act: *In re Debenture-holders' Actions* (2); Stiebel's Company

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possession being taken as aforesaid, as the case may be."

Sub-s. 3. "Any payments made under this section shall be recouped as far as may be out of the assets of the company available for payment of general creditors."

Sect. 209 of Part IV. provides as follows:

Sub-s. 1. "In a winding up there shall be paid in priority to all other debts— . . . .

"(*b*) All wages or salary of any clerk or servant in respect of services rendered to the company during four months before the said date, not exceeding 50*l*.; and . . . .

"(*d*) Unless the company is being wound up voluntarily merely for the purposes of reconstruction or of amalgamation with another company, all amounts (not exceeding in any individual case 100*l*.) due in respect of compensation under the Workmen's Compensation Act, 1906, the liability wherefor accrued before the said date, subject nevertheless to the provisions of section 5 of that Act."

(1) [1898] 2 Q. B. 402, 415.

(2) [1900] W. N. 58.

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Law, p. 572. (1) It is quite clear that the 1897 Act was construed as requiring immediate payment of these preferential claims, and not merely as giving them priority over debentures, and s. 107 of the Consolidation Act should be construed accordingly. In any case priority over debenture-holders involves priority over ordinary creditors, and payments to ordinary creditors are a breach of the section. The 1897 Act applied to a receiver appointed by debenture-holders—*In re Barnby's, Ld.* (2)—and s. 107 is equally applicable.

A managing director is not a "clerk or servant" within s. 209, sub-s. 1, clause (*b*): *In re Newspaper Proprietary Syndicate, Ld.* (3), a decision under the corresponding section of the Preferential Payments in Bankruptcy Act, 1888, s. 1, sub-s. 1, clause (*b*), now repealed.

Samuel Moses, for the defendant. I admit that a managing director is not a "clerk or servant" within these statutes. The only real question is whether the defendant has committed any breach of s. 107. That section provides that debts made preferential by s. 209 shall be paid forthwith out of any assets coming to the hands of the receiver "in priority to any claim for principal or interest in respect of the debentures." It merely supplements s. 209 and gives preferential debts as against assets in the hands of a receiver the same priority that they would have in a winding-up.

[ASTBURY J. That construction gives no meaning to "forthwith" out of "any" assets.]

The section cannot have been intended to prevent a receiver and manager from paying current liabilities necessarily incurred in carrying on the business. In the present case immediate payment of this preferential claim would have exhausted the assets and stopped the business altogether. The defendant has not paid anything to the debenture-holders.

There is a further difficulty in this case. Sects. 107 and 209 are clearly confined to actual "debts." Now at the date of the defendant's appointment there was no debt; there was merely

(1) See also Seton on Judgments, 6th ed. p. 769; 7th ed. p. 735; Buckley on Companies, 9th ed. pp. 236, 240, 262.

(2) [1899] W. N. 103.

(3) [1900] 2 Ch. 349.

a claim which might or might not ripen into a debt. Sect. 209 gives priority to all "amounts" not exceeding 100*l.* "due" in respect of compensation under the Workmen's Compensation Act, 1906, "the liability wherefor accrued before the said date." It is far from clear that any liability "accrued" before the award of May 14, 1912, or at all events before April 1, 1912, when proceedings were taken, but it is surely clear that no "amount" was "due" until one or other of these dates, and by April 1, 1912, the 30*l.* book debts had been exhausted in carrying on the business. The defendant cannot therefore be liable for the 30*l.* book debts, even if he is wrong on his main contention under s. 107.

H. H. Daw in reply. The liability accrued and the amount became due at the death of the plaintiff's husband, or at all events on the statutory notice. The amount due is a simple matter of calculation based on his earnings: Workmen's Compensation Act, 1906, Sched. I., r. 1, clause (*a*).

Cur. adv. vult.

June 26. ASTBURY J. (after stating the facts). In these circumstances the question arises whether s. 107 of the Companies (Consolidation) Act, 1908, imposes any and if so what obligation upon a receiver and manager appointed by debenture-holders who, having assets of the company in hand and notice of a preferential claim, pays away those assets to ordinary creditors in the process of carrying on the company's business, without making or attempting to make any provision for that preferential claim, as I hold was the fact in this case, and whether an action for damages will lie in such a case.

The defendant admits that at the date of the winding-up no preferential creditors other than the plaintiff existed whose debts were incurred prior to March 23, 1912.

[His Lordship then read s. 5, sub-s. 3, of the Workmen's Compensation Act, 1906, and s. 107 and s. 209, sub-s. 1, clauses (*b*) and (*d*), of the Companies (Consolidation) Act, 1908, and continued:]

In *Groves* v. *Lord Wimborne* (1) Vaughan Williams L.J. says: "It cannot be doubted that, where a statute provides for

(1) [1898] 2 Q. B. 402, 415.

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the performance by certain persons of a particular duty, and some one belonging to a class of persons for whose benefit and protection the statute imposes the duty is injured by failure to perform it, prima facie, and, if there be nothing to the contrary, an action by the person so injured will lie against the person who has so failed to perform the duty."

This principle was illustrated in *Pulsford* v. *Devenish*. (1) In that case the business and assets of a company in voluntary liquidation were transferred as a going concern to a new company in consideration of fully-paid shares in the new company, who covenanted to pay the debts and liabilities of the old company. The liquidator received the fully-paid shares and distributed them among the shareholders of the old company without making any provision for the creditors, leaving payment of their claims to the new company. The old company was then finally dissolved. There were certain unpaid creditors whose claims the new company refused to pay, so they sued the liquidator. Farwell J. held that the liquidator had been guilty of negligence in the discharge of his statutory duty to creditors under s. 133 of the Companies Act, 1862 (25 & 26 Vict. c. 89), and was liable in damages to unpaid creditors of the old company of whose claims he was aware and who had no notice of the liquidation until long after the dissolution of the old company. He said: "The defendant has told me that he did not pay one single creditor, that he took no steps whatever to see to the payment of any creditors of any sort, but left everything to the new company, and trusted entirely to their covenant of indemnity, and proceeded to call the final meeting of the old company, which would involve dissolution at the end of three months, without inquiring whether the new company had paid all the debts or not. . . . . A more gross dereliction of duty by a liquidator I have seldom heard of." He held that, as the creditors' ordinary remedy by application in the liquidation had expired on the dissolution, a common law action for breach of the statutory duty would lie, and he gave damages against the liquidator.

In *In re Debenture-holders' Actions* (2) Stirling J. said that, "after consideration, all the judges of the Chancery Division

(1) [1903] 2 Ch. 625, 632. (2) [1900] W. N. 58.

were now agreed that in all cases where a receiver is appointed in a debenture-holder's action, a direction is to be inserted in the order that the receiver do forthwith, out of any assets coming to his hands, pay the debts of the company which have priority over the claims of the debenture-holders under the Preferential Payments in Bankruptcy Amendment Act, 1897; and that the receiver be allowed all such payments in his accounts."

It is not disputed in this case that a managing director is not a clerk or servant within the meaning of s. 209: *In re Newspaper Proprietary Syndicate, Ld.* (1)

Two views have been contended for before me as to the true construction of s. 107.

(1.) That a receiver and manager with notice of a preferential claim is liable for damages in tort for exhausting the then assets of the company in making payments to ordinary creditors, without first applying the same or a sufficient part thereof in satisfying such preferential claim.

(2.) That his only obligation thereunder is to avoid applying such assets, after notice, in actual payment of principal or interest to debenture-holders before satisfying thereout the preferential claim.

There does not appear to be any direct authority on this point, but in my judgment the former is the correct view.

I have been asked by both parties, in the event of my so holding, to assess the damages myself and not to put the parties to the further expense of an inquiry.

Accordingly, after giving the best consideration I can to the evidence and to the books of the company kept during the receivership period, I hold that the defendant has committed a breach of his statutory duty under s. 107, and I assess the damages caused to the plaintiff thereby at 50*l.* and I give judgment for her for that sum and the costs of the action.

Solicitors: *G. H. Barber & Son; Reginald George Davis.*

(1) [1900] 2 Ch. 349.

G. R. A.

JOYCE J.

1913

April 25 ; *May* 5.

HOPE BROTHERS, LIMITED *v.* COWAN.

[1912 H. 1981.]

Landlord and Tenant—Demise of First Floor Office—Right to fix Flower Boxes outside Office Windows—Trespass—Demise of both Sides of Outer Wall.

The demise of a floor or a room or an office bounded in part by an outside wall prima facie includes both sides of that wall, unless there be an exception or a reservation or something in the context to exclude it.

The plaintiffs demised an office situate on the first floor of the plaintiffs' leasehold premises to the defendants, who covenanted (inter alia) to keep the inside parts of the office in good and substantial repair. The plaintiffs covenanted to keep in repair the external parts of the demised premises and to permit the defendants to affix their trade signs, to be approved by the plaintiffs, on the outside of that portion of the building in their occupation, and, subject to this latter covenant, the defendants covenanted not without first obtaining the written consent of the plaintiffs to attach or affix any sign, nameplate, or letters to the premises, and to remove all outside names and trade signs at the determination of the tenancy and to make good all damage caused to the outside walls of the building thereby. By the lease under which the plaintiffs themselves held they were bound to repair and maintain the walls of the building.

The defendants, without obtaining the consent of the plaintiffs, affixed flower boxes outside the three windows of their office. In an action by the plaintiffs to restrain this alleged trespass :—

Held, that there was nothing in the defendants' lease to exclude the operation of the general rule ; that the demise included the outside of the outer wall of the office ; and that the plaintiffs were not entitled to an injunction.

Carlisle Café Co. v. *Muse Brothers & Co.* (1897) 67 L. J. (Ch.) 53 ; 77 L. T. 515, followed.

ACTION.

The plaintiffs were lessees of certain buildings and premises situate at the corner of Lord Street and Whitechapel in the city of Liverpool, Nos. 99 and 100, Lord Street, and 1, 3, and 5, Whitechapel, and known as Sefton Buildings, and were by the terms of the lease under which they held the premises bound to repair, support, uphold, amend and maintain the walls of the said premises, and were also prohibited from making any structural alterations or additions to the premises without the written licence of the lessors first had and obtained.

By an indenture of underlease made on November 9, 1911, between the plaintiffs of the one part and the defendants of the other part, the plaintiffs demised unto the defendants "All that office numbered one situate on the first floor of the premises known as Sefton Chambers Whitechapel Liverpool Together with the use in common with the other tenants of the plaintiffs of the entrance to the said premises in Whitechapel aforesaid and of the staircases and landing leading to the said office" for the term of nineteen years from December 25, 1911, at the yearly rent of 125*l.* for the first two years and 150*l.* for the remainder of the term. The defendants covenanted (inter alia) to pay the rent, "to keep the whole of the inside parts of the said office including the glass in the windows doors and the fixtures and fittings and all water taps pipes and drains in good and substantial repair and condition and so to leave the same at the expiration of this demise (damage by fire only excepted) and to repair and make good all damage to the walls or that may be caused to the premises hereby demised by the bursting of any water pipe tap or cistern upon or in any way connected with the demised premises"; "not without the consent and approval in writing of the" plaintiffs "first obtained (*a*) to alter any part of the structure of the said office (*c*) to advertise or exhibit any advertisement of whatever description in or upon the entrance hall staircases landings or passages of the said premises nor attach or affix any sign nameplate or letters to the premises subject to the" plaintiffs' "covenant hereinafter contained"; and "to remove all outside names and trade signs at the expiration or sooner determination of the said tenancy and to make good all damage caused to the outside walls of the building thereby."

The plaintiffs covenanted with the defendants (inter alia) "to permit the" defendants "to affix their names and business description in manner approved by the" plaintiffs "upon the wall of the main entrance to the said chambers upon payment of" the further sum therein mentioned "and to affix their trade signs on the outside of that portion of the building in their occupation subject to the approval of the" plaintiffs and "to keep in repair the roof chimneys main walls main timbers outside

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water spouts and outside drains and other external parts of the said premises and the entrance to such premises and the staircases landings and passages leading to the said office at their own expense."

The office so leased to the defendants had three windows on the first floor above the ground floor and over a projecting cornice two feet wide bordered on the outside by a dwarf ornamental railing.

In May, 1912, the defendants, without the previous written consent of the plaintiffs, had placed flower boxes in their windows resting on or supported in some way partly, though not altogether, by props of wood resting on the top of the cornice. In consequence of a complaint relating to the dripping of water from the boxes, the plaintiffs' local manager required their removal, and the defendants thereupon placed the boxes so that they no longer rested on the plaintiffs' cornice but upon some brackets or stanchions screwed into the lower part of the window frames of their office windows. The boxes did not project beyond the plaintiff's cornice.

The plaintiffs objected to the window boxes and commenced these proceedings. By their writ they claimed an injunction to restrain the defendants from affixing or allowing to remain affixed to the outer wall of the first floor of the plaintiffs' premises any brackets, stanchions, or boxes without the consent and approval of the plaintiffs; and by their statement of claim they also asked in the alternative for an injunction to restrain the defendants from allowing water to drip from the window boxes.

At the trial of the action evidence was given with reference to the dripping of the water, but the only question calling for a report was that relating to the defendants' right to affix the window boxes to the outside wall.

Cunliffe, K.C., and *Sheldon*, for the plaintiffs. The defendants have no right to the outside walls of the office except for the purposes specified in the lease, and by affixing the boxes they have committed a trespass. The repairing covenant contains a distinction between "walls" and "the premises hereby demised,"

and the plaintiffs' covenant to permit the defendants' name to be affixed on the outside of the building in their occupation was meaningless if the outside wall had already been demised to the defendants. The defendants' sole right is to affix trade signs under licence. The boxes interfere with the plaintiffs' performance of their duty to paint outside.

In *Carlisle Café Co.* v. *Muse Brothers & Co.* (1) the whole top floor was demised, not merely one room on a middle floor, and at the most that case only shews that in the absence of anything in the lease or the circumstances the lessee only gets a reasonable use of the walls.

It cannot be said that these boxes were essential to the business or fixed up for the purposes of the business as in *Bickmore* v. *Dimmer* (2), and having regard to that decision, we cannot contend that the affixing of the boxes amounted to a structural alteration.

Hughes, K.C., and *Benas*, for the defendants. By this lease there is a demise of the wall so far as it is the wall of the premises demised. The demise of part of a house carries the buildings: *Carlisle Café Co.* v. *Muse Brothers & Co.* (1); Woodfall's Landlord and Tenant, 16th ed. p. 150; Foa's Landlord and Tenant, 4th ed. p. 77; Redman's Landlord and Tenant, 6th ed. p. 89; and there is nothing in the lease to negative that general rule. The external walls of the premises are part of the premises, and the restriction on advertising contained in the defendants' covenant implies that but for that the defendants could advertise.

The defendants have not broken any covenant in their lease and were entitled to put up these boxes: *Bickmore* v. *Dimmer*. (2)

Cunliffe, K.C., in reply. *Bickmore* v. *Dimmer* (2) has no relation to this case. There the lessee had covenanted to alter the front of the shop; and in *Carlisle Café Co.* v. *Muse Brothers & Co.* (1) there was only a simple letting with nothing in the lease in favour of either view. The provisions in the defendants' lease are directed to shew that the lessees have no rights over the outside walls except for limited advertising purposes, and the lease

(1) 67 L. J. (Ch.) 53; 77 L. T. 515. (2) [1903] 1 Ch. 158.

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says in effect that the windows are to be treated as part of the inside of the premises.

Cur. adv. vult.

May 5. JOYCE J. stated the facts and reviewed the evidence relating to the dripping of the water from the window boxes and came to the conclusion that on that issue the plaintiffs had no ground of complaint. His Lordship continued:

Then there remains the serious question as to whether there was any right to erect the window boxes in the way which the defendants have done. These boxes do not project beyond the edge of the cornice I have mentioned, and the allegation in the statement of claim that they project immediately above the shop window and overhang the pavement of Lord Street is not true. The cornice projects beyond the flower boxes and the brackets, and so little do the plaintiffs care about the dripping of the water that they have left whatever wet there might be from rain to drip off their own cornice on to the pavement, and therefore as to that I do not think they can seriously complain or have ever been seriously inconvenienced.

Now, after the arguments I have heard, it appears to me that speaking generally in the case of a demise of one floor of a building, or of a room on any floor which is bounded or enclosed on one or more sides by an outside wall, unless the outside wall be excepted or reserved or there be some context which leads to a contrary conclusion, prima facie the premises demised comprise the whole; that is to say, both sides of the outside wall. This is so prima facie, and as far as I am aware the contrary has never been suggested in reference to a ground floor nor in reference to a top floor; but it has been suggested—certainly it was argued—in this case with reference to a room on the middle floor. I do not see what difference the particular floor makes. The demise of a room must necessarily include, unless it be excepted, some part of the wall which bounds it. I do not know whether if there be an adjoining room let to somebody else it could be said that the wall demised was a sort of party wall or not, but that does not arise here; no such consideration as that arises with reference to an outside wall.

I am of opinion that, unless there be an exception or a reservation or something in the context to exclude it, prima facie where there is a demise of a floor or a room or an office bounded in part by an outside wall, in that case the premises demised comprise both sides of the wall. That has been decided more or less clearly already by Byrne J. in *Carlisle Café Co.* v. *Muse Brothers & Co.* (1), and my own opinion I have just stated.

In this underlease itself, so far as there is anything express beyond the description of the parcels, I find nothing to favour the plaintiffs' contention that the outside wall of the premises demised was excluded. In my opinion the terms of the deed itself favour the contrary conclusion. I have mentioned that the underlease contained a covenant by the underlessees not to make any alteration so as to alter the structure, and but for the decision in *Bickmore* v. *Dimmer* (2) which has been mentioned to me I might have doubted whether what has been done here were not an alteration to the structure. But, however, the contention that what the defendant had done was any alteration in the structure was expressly disclaimed at the Bar.

As I have said, the question of the outside of the wall was decided by Byrne J. in the case of *Carlisle Café Co.* v. *Muse Brothers & Co.* (1), and I am of opinion in this case that, looking at the premises demised by the underlease to the defendants, the demise did include the outside of the outer wall of the offices. That being so, it appears to me that the claim originally set up in the action fails, and, in my opinion, the action fails also as to the allegation made with reference to the dripping of water; and, therefore, on the whole the action must be dismissed with the usual consequences.

Solicitors: *Sayle, Carter & Co.; W. W. Wynne & Sons, for W. Holland Owen, Liverpool.*

(1) 67 L. J. (Ch.) 53; 77 L. T. 515. (2) [1903] 1 Ch. 158.

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May 27.

In re BENNETT.

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[1913 B. 898.]

Lunacy—Jurisdiction—Allowances to Relatives of Lunatic—Orders directing Payment of Surplus Income of Estate of Lunatic to her Daughters—Death of Lunatic—Moneys in Hands of Committee representing unapplied Surplus Income—Claim by Daughters—Rules in Lunacy, 1892, *r.* 81.

Under orders in lunacy the net surplus income of a lunatic's estate, after providing for the maintenance of the lunatic and other allowances, was ordered to be paid to her daughters in certain shares. At the death of the lunatic the committee of her estate had in his hands certain moneys representing net surplus income received by him since the last payments made by him to the daughters, which he subsequently paid over to the administrator with the will annexed of the lunatic. These moneys were claimed by the daughters as due to them under the orders in lunacy:—

Held, that the death of the lunatic determined the jurisdiction in lunacy and that the moneys in the hands of the administrator were not therefore payable to the daughters under the orders in lunacy, but formed part of the corpus of the lunatic's estate and were applicable according to the provisions of her will.

In re Way (1861) 30 L. J. (Ch.) 815; 3 D. F. & J. 175, and *In re Marman's Trusts* (1878) 26 W. R. 621, followed.

Adjourned Summons.

Mrs. Sarah Anne Bennett was by an order in lunacy dated April 12, 1889, found to be of unsound mind, and a committee of her estate was appointed. Prior to that date she had by a will dated April 28, 1881, and a codicil thereto dated September 19, 1884, disposed of her property as therein mentioned.

Up to 1908 under various orders in lunacy the maintenance of the lunatic was provided for, and a sum of 150*l.* per annum was allowed to each of the lunatic's three daughters, Irene Florence Augusta Bennett, Theodora Constance Mabel Adams, and Marguerite Winifred Bennett, who afterwards became Mrs. Skinner.

By an order in lunacy dated March 12, 1908, it was ordered that subject to the existing allowances as thereby modified the net surplus income of the lunatic's estate should be divided into four parts, and that one of such parts should be allowed to Mrs. Adams, another of such parts should be allowed to Irene F. A. Bennett, and the remaining two fourth parts should be allowed until further order to Mrs. Skinner.

On July 17, 1911, in contemplation of the approaching marriage of Mrs. Skinner, a summons in lunacy was taken out by the three daughters and the committee asking (inter alia) that the net surplus income should be divided among the three daughters equally. The summons came before the Master on July 20, 1911, who indorsed on it the word "sanctioned"; but no formal order was drawn up.

On August 14, 1911, Mrs. Skinner was married.

On October 30, 1911, the lunatic died.

On May 4, 1912, the committee lodged and passed his final account, and on May 10, 1912, paid to the administrator with the will annexed of the lunatic the sum of 711*l.* 6*s.* 7*d.*, being the balance of the lunatic's income in his hands at her death, after deducting therefrom lunacy percentage, his remuneration, and the costs of passing the account.

There was also a sum of 609*l.* 18*s.* 5*d.* received by the administrator in respect of income accruing during the life of the lunatic but not paid till after her death.

Questions having been raised as to how the two sums of 711*l.* 6*s.* 7*d.* and 609*l.* 18*s.* 5*d.*, amounting together to 1321*l.* 5*s.*, ought to be dealt with, this summons was taken out by the administrator with the will annexed, to which the three daughters were made defendants, asking that it might be determined (inter alia) whether the defendants respectively were entitled to payment of any and if so what part or parts of the 1321*l.* 5*s.*, or whether the whole of that sum formed part of the capital of the residuary estate of the testatrix or how otherwise.

Mrs. Skinner claimed that the whole of the 1321*l.* 5*s.*, or at any rate the 711*l.* 6*s.* 7*d.* which had come to the hands of the committee, was bound by the orders of March 12, 1908, and July 20, 1911, and ought to be distributed accordingly.

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The other daughters claimed that the whole of the 1321*l.* 5*s.* formed part of the corpus of the testatrix's residuary estate.

T. J. C. Tomlin, for the summons. The Court in Lunacy deals with the property of a lunatic in the manner in which it presumes that the lunatic would have dealt with it if he had been compos mentis. The test applied by the Court in making allowances to members of a lunatic's family is, "Would the lunatic have done so himself?": Heywood and Massey's Lunacy Practice, 4th ed. p. 560; *Ex parte Whitbread.* (1) On the death of the lunatic the jurisdiction in lunacy ceased and the 711*l.* 6*s.* 7*d.* in the hands of the committee was no longer applicable under the orders in lunacy, but forms part of the corpus of her residuary estate. The principle is clear.

The 609*l.* 18*s.* 5*d.* represents something which never came into the hands of the committee and to which therefore the defendants can have no claim.

Herbert Brown, for the defendants Irene Florence Augusta Bennett and Theodora Constance Mabel Adams. I take the same view. In making allowances to a lunatic's relatives the Court in Lunacy acts on the presumption of what the lunatic would himself have done, as stated by Lord Eldon in *Ex parte Whitbread.* (2) But on a supersedeas the lunatic himself, or on the lunatic's death his legal personal representative, has a paramount title, free from any such presumption, and the jurisdiction in lunacy comes to an end, except for the purpose of handing over the fund to the person so entitled: Rules in Lunacy, 1892, r. 81. (3) There is no exact authority

(1) (1816) 2 Mer. 99.

(2) 2 Mer. 102, 103.

(3) Rules in Lunacy, 1892, r. 81, provides:

"Upon the discharge or death of the committee of the estate, or upon the issue of a supersedeas or the death of the lunatic, the Masters shall take and pass the account of the committee from his appointment or from the foot of his last account. If a balance is certified to be due from the committee or his estate, he or his legal personal representatives shall pay the same into Court, by virtue of the certificate or otherwise, within such time as the Masters direct, or in the case of a supersedeas shall pay the same to the person whose lunacy has been superseded, or in the case of the death of the lunatic shall pay the same to the legal personal representatives of the lunatic. If the

covering the point, but in *In re Way* (1) the judges in lunacy held that they had no jurisdiction to sanction a Master's report made after the lunatic's death. And in *In re Marman's Trusts* (2) the judges in lunacy expressed the opinion that they had no power to direct the administrator to pay the debts of the lunatic. "I know of no case," said Cotton L.J., "where the Court of Chancery assumed jurisdiction to deal with a fund after the death of the person of unsound mind to whom it belonged." That was a stronger case than the present, which is one of payment to volunteers. I submit therefore that not only the 609*l.* 18*s.* 5*d.*, which was never in the committee's hands at all, or bound by any orders in lunacy, but also the 711*l.* 6*s.* 7*d.* is property in the hands of the administrator as part of the corpus of the testatrix's residuary estate.

Dighton Pollock, for the defendant Mrs. Skinner. Where the Court in Lunacy has come to the conclusion that it is for the benefit of the lunatic that a fund should be applied in a particular manner, and has made an order to that effect, it is submitted that that order applies to all moneys coming into the hands of the committee before the death of the lunatic. The orders in lunacy in the present case were in force up to the date of the death of the lunatic. But for the accident of the death this money would have been divided among the three defendants as provided by the orders. It is submitted therefore (1.) that there was an order for payment which was in force during the time that the moneys were received by the committee, and (2.) that the jurisdiction in lunacy had been exercised and that the defendants had acquired vested interests in the moneys in the hands of the committee.

Masters find a balance due to the committee or his estate, the same shall be paid to him or his legal personal representatives by the new committee out of the lunatic's estate, or in the case of a supersedeas by the person whose lunacy has been superseded, or in the case of the death of the lunatic by his legal personal representatives. Upon payment of the balance, if any, or if no balance is found due or the taking of the account is not required and may in the opinion of the Masters be properly dispensed with, the security of the committee shall be discharged."

(1) 30 L. J. (Ch.) 815; 3 D. F. & J. 175.

(2) 26 W. R. 621, 622.

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WARRINGTON J. This is an application in the matter of the estate of Sarah Anne Bennett. The applicant is the administrator with the will annexed. He has in his hands a sum of 1321*l.* 5*s.* It is made up of two sums, one of 711*l.* 6*s.* 7*d.* paid to him by the committee of the estate of the deceased Sarah Anne Bennett which represents income accrued and paid to the committee during her lifetime; and the balance, 609*l.* 18*s.* 5*d.*, represents the apportioned part of the income of the deceased from the time of the last payment to the committee down to the date of her death. There is a dispute with regard to this sum of 1321*l.* 5*s.*, whether it is to be treated as part of the corpus of the deceased's residuary estate, or whether any and if so what part of it is to be dealt with under certain orders in lunacy. The testatrix was found to be of unsound mind in 1889. She had three daughters, who are the defendants to the present action—Miss Irene Florence Augusta Bennett, Mrs. Adams, and Mrs. Skinner. The testatrix had a considerable income, and applications were from time to time made to the Court in Lunacy and orders were made thereon, providing for the due maintenance of the lunatic and subject thereto for allowances to the three daughters. The last of these orders was made on March 12, 1908, and the Master then gave directions that, subject to the existing allowances, i.e., 150*l.* per annum to each of the three daughters, the net surplus income should be divided into four parts and that two of such fourth parts should be paid to Marguerite Winifred Bennett, afterwards Mrs. Skinner, and that the remaining two fourth parts should be paid to Miss Irene Florence Augusta Bennett and Mrs. Adams in equal shares. On July 17, 1911, in view of the approaching marriage of Mrs. Skinner, a further application with reference to these allowances was made to the judge in lunacy, asking (inter alia) that the net surplus income might be divided amongst the three daughters equally. That application came before the Master on July 20, 1911, and he has indorsed upon the summons the word "sanctioned," but no formal order was drawn up. The lunatic died on October 30, 1911. The Rules in Lunacy, 1892, by r. 81 provide that upon the death of a lunatic the Masters shall take and pass the account of the committee from the foot

of his last account, and that if any balance is certified to be due from him the committee shall pay the same to the legal personal representatives of the lunatic. The committee complied with this rule, and on May 4, 1912, his final account was passed. That account shewed a balance of 711*l.* 6*s.* 7*d.* remaining in his hands, which was on May 10, 1912, paid by him to the administrator with the will annexed of the testatrix. The whole of that balance represents income of the testatrix accrued and paid during her lifetime. The balance of the fund now in question, 609*l.* 18*s.* 5*d.*, represents income accrued but not paid during the lifetime of the lunatic; it was never paid to the committee at all, but was an apportioned part of the income received by the administrator after the death of the lunatic. As to the last there can be no question whatever. No order in lunacy can affect that which never came into the hands of the committee; that part of the fund clearly forms part of the estate in the administrator's hands. The only possible question is with regard to the 711*l.* 6*s.* 7*d.*, income received by the committee but not expended by him. Mrs. Skinner contends that this sum ought to be dealt with in the manner provided by the order of March 12, 1908, or by that order as modified by the sanction or order of July 20, 1911. It is unnecessary to consider whether a sanction by the Master is equivalent to an order. Speaking offhand I should say it was.

I will treat the matter, however, as if it depended on the order of March 12, 1908. Is there any jurisdiction now to order that the fund shall be dealt with as if the lunatic were still alive? In my opinion there is not. On the death of the lunatic the committee ceased to have any authority to deal with money in his hands except as the Rules in Lunacy provide—i.e., to hand it over to the administrator or to pay it into Court. Except for this purpose the powers and duties of the committee come to an end on a supersedeas or the death of the lunatic. That this is so is plainly shewn by *In re Way* (1) and *In re Marman's Trusts.* (2) In *In re Way* (1) the facts were these. The committee had entered into an agreement purporting to bind the estate of the lunatic which had to be submitted for report to the

(1) 30 L. J. (Ch.) 815, 816; 3 D. F. & J. 175. (2) 26 W. R. 621.

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Master. The Master had not made his report till after the death of the lunatic. An application was made to the Lords Justices to confirm the report. Knight Bruce L.J. said: "Whether if the Master's report had been made in the lifetime of the lunatic we could have done anything is a point on which I will give no opinion; but as the report was not made till after his death I am clear we have no jurisdiction. Whether the Master can make any report in the matter of a lunacy after the death of the lunatic so as to affect his estate is at least doubtful. But that we have not any jurisdiction is clear. The only order, therefore, which we can make on this application will be for the taxation of the costs incurred since the death of the lunatic, which order we are empowered to make under the recent Statute for Improving the Jurisdiction in Lunacy." Turner L.J. said: "As the report was not made till after the death of the lunatic, it is out of our power to interfere." (1) It is true that Knight Bruce L.J. did express a doubt whether if the report had been made in the lifetime of the lunatic the position would have been the same. But I think that doubt is capable of the simplest explanation when one considers what the subject-matter was with which the Court was asked to deal. An agreement having been entered into, the important step, in order to render it binding, is the Master's report in its favour, and unless there is some serious ground for not accepting the report, the confirmation by the Court is merely a matter of course. One can quite see that there is in such a case a material difference between a report made in the lifetime of the lunatic and one made after the death. But the whole point in the case according to the view of Knight Bruce L.J. and Turner L.J. is that the jurisdiction in lunacy comes absolutely to an end on the death of the lunatic. *In re Marman's Trusts* (2) illustrates the same point with considerable force. In that case the facts were these: A pauper lunatic, who had been maintained in a lunatic asylum at the expense of a local authority, became entitled to a fund in Court. Subsequently an order was made for payment out of the fund of a reasonable annual sum for the continued

(1) The citations are from the report, *Law Journal*, which gives the fuller

(2) 26 W. R. 621.

maintenance of the lunatic in the asylum, which was in arrear at the time of his death. After his death his administratrix petitioned for payment out of the fund. The petition was opposed by the local authority, who claimed that the arrears of expenses of the lunatic's maintenance ought to be paid to them before the fund in Court was paid out to the administratrix. The Lords Justices before whom the case came held that they could not interfere with the power of the administratrix to deal with the fund and pay the lunatic's debts. They took the view that after the death of the lunatic the administratrix and not the Court in Lunacy had jurisdiction to deal with his property, and refused to interfere.

I have here to deal with the case of an order made directing the payment of a fixed annual sum for the maintenance of the lunatic and of fixed annual sums by way of allowance to the daughters, and subject thereto the allowance of the net surplus income to the daughters in certain proportions. It was the practice of the committee to pass his accounts every two years. The last account for the two years ending December 31, 1909, shewed a surplus, which the committee duly divided in accordance with that order. During the period between January 1, 1910, and October 30, 1911, the date of the lunatic's death, the committee paid the annual sum ordered for the maintenance of the lunatic, and the fixed allowances to the daughters, and also made payments on account of the net surplus income, the actual surplus not being ascertained. As to the balance remaining in his hands at the date of the lunatic's death, it is said that it ought to be divided as it would have been if the lunatic had remained alive. I do not think so, for this additional reason, that the daughters have no contractual claim whatever. They are simply volunteers. The Court does what the parent would have done. To take the ordinary case of a father who, having made a fixed voluntary allowance to his son, dies leaving it in arrear, or dies between the usual dates of payment. In such a case the son could have no claim whatever against the father's estate in respect of such voluntary allowance. It seems to me that the daughters in this case are in no better position than they would be if they had been receiving a voluntary allowance from their mother. I hold,

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therefore, that Mrs. Skinner's claim fails on two grounds, first, because the orders in lunacy came to an end on the death of the lunatic, and, secondly, because even if this were not the case the daughters could have had no greater rights than they would have had if the allowances made to them by the orders in lunacy had been voluntary allowances made to them by their mother.

The position of the Court in relation to allowances out of the income of a lunatic's estate is made quite clear by the judgment of Lord Eldon in *Ex parte Whitbread.* (1)

I therefore answer the question in the summons by declaring that the 1321*l.* 5*s.* in the hands of the plaintiff as administrator forms part of the capital of the residuary estate of the testatrix.

Solicitors: *Davenport, Cunliffe & Blake, for Tatham, Worthington & Co., Manchester; Andrew, Wood, Purves & Sutton, for Collin & Adams, Saffron Walden.*

W. I. C.

WARRINGTON J. 1913 *June* 4, 17.

In re PIGGIN.

Ex parte MANSFIELD RAILWAY COMPANY.

Practice—Costs—Settled Land—Purchase by Railway Company under Compulsory Powers—Payment into Court of Purchase-money—Petition for Payment out by Trustees for Purposes of Settled Land Acts—Separate Appearance of Tenant for Life—Costs—Lands Clauses Consolidation Act, 1845 (8 *& 9 Vict. c.* 18), *s.* 80.

On a petition by the three trustees of a will who were also trustees for the purposes of the Settled Land Acts, and one of them a tenant for life of one moiety as well of the settled estate, for payment out of money paid into Court in respect of the purchase-money of land forming part of the settled estate taken by a railway company under its compulsory powers, the tenant for life of the other moiety and the two remaindermen who appeared by one counsel were held to be properly made respondents and their costs were ordered to be paid by the railway company under s. 80 of the Lands Clauses Consolidation Act, 1845.

Petition for payment out of Court.

William Piggin, by his will dated April 8, 1879, devised all his real estate to trustees (of whom Maria Smith was one) upon

(1) 2 Mer. 99.

trust, after providing for a certain annuity which had now ceased, to pay one equal moiety of the income thereof to Maria Smith for life and after her death to pay the same moiety of the income to Hilda Jane Cox for life and after her death to or for the benefit of her children until the youngest should attain the age of twenty-one years. And he declared that his trustees should pay the other equal moiety of the income of his real estate to Hilda Jane Cox for life and after her death to or for the benefit of her children until the youngest should attain the age of twenty-one years. And he declared that so soon after the death of the survivor of Maria Smith and Hilda Jane Cox as the youngest child of the latter should attain the age of twenty-one years the whole of his real estate should be sold and the net moneys arising therefrom should be held in trust for all or any of the children of Hilda Jane Cox who being a son or sons should attain the age of twenty-one years or being a daughter or daughters should attain that age or marry, and if more than one in equal shares as tenants in common.

The testator died on July 26, 1880.

On April 7, 1881, an order was made for the administration of the estate by the Court, and on June 26, 1883, an order on further consideration.

By an order made on November 26, 1906, in the action and in the matter of the Settled Land Acts, 1882 to 1890, F. H. Pratt and W. Calvert were appointed jointly with Maria Smith trustees of the settlement created by the will of the testator so far as the same related to the hereditaments situate in the city of Nottingham and in the counties of Nottingham and Leicester then subject to the trusts of the will for the purposes of the Settled Land Acts, 1882 to 1890, and it was ordered that notwithstanding the administration order and the order on further consideration Hilda Jane Cox and Maria Smith, who together constituted the tenant for life of the real estate devised by the will, should be at liberty to exercise the powers conferred on a tenant for life by the Settled Land Acts, 1882 to 1890.

By an order made on April 16, 1912, in the action and in the matter of the Settled Land Acts, 1882 to 1890, Edward Slater and George Rawson were appointed trustees of the will in

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substitution for two trustees who had died, and jointly with Maria Smith, and by the same order Edward Slater and George Rawson were appointed trustees of the settlement created by the will of the testator for the purposes of the Settled Land Acts, 1882 to 1890, in substitution for F. H. Pratt, who was desirous of retiring, and W. Calvert, who had died, and jointly with Maria Smith.

The trustees had not any present power of sale.

By the Mansfield Railway Act, 1910, which incorporated the Lands Clauses Consolidation Act, 1845, the Mansfield Railway Company was authorized to make the railway therein mentioned.

The trustees had recently agreed with the railway company under the provisions of the Lands Clauses Consolidation Act, 1845, for the sale to the railway company of certain pieces of land situate in the parish of Mansfield in the county of Nottingham, forming part of the testator's real estate, at the price of 1800*l.*

On March 25, 1913, the railway company paid the 1800*l.* into Court to the credit of "*Ex parte* the Mansfield Railway Company, In the matter of the Mansfield Railway Act, 1910, the vendors Maria Smith, Edward Slater and George Rawson being trustees without power of sale."

By an indenture dated March 31, 1913, the pieces of land in question were conveyed by the trustees to the railway company.

Hilda Jane Cox had had issue two children, namely, William Thomas Cox and Hilda Maxwell, the wife to William Harold Maxwell, both of whom had attained the age of twenty-one years.

The present petition, to which the railway company, Hilda Jane Cox, William Thomas Cox, and Hilda Maxwell were made respondents, was presented by the trustees asking that the 1800*l.* in Court might be paid out to them as the trustees of the settlement created by the will of the testator for the purposes of the Settled Land Acts, 1882 to 1890, and that pursuant to s. 80 of the Lands Clauses Consolidation Act, 1845, the railway company might be ordered to pay the costs of the petition.

The petition came on for hearing before Warrington J. on June 4, 1913.

L. F. Potts, for the petitioners.

Ashton Cross, for the respondents Hilda Jane Cox, William Thomas Cox, and Hilda Maxwell.

E. E. H. Brydges, for the railway company.

WARRINGTON J. made the order as prayed.

June 17. A question having arisen as to whether the costs of the respondent beneficiaries ought to be included in the costs ordered to be paid by the railway, the petition was restored to the paper for argument on this point.

E. E. H. Brydges, for the railway company. The railway company ought not to be required to pay the costs of the respondent beneficiaries. The trustees were persons entitled to give a good discharge for the money ordered to be paid out: Settled Land Act, 1882, ss. 22, 32; Settled Land Act, 1890, s. 14. It was therefore unnecessary to serve the respondent beneficiaries at all. The beneficiaries were not served in *In re Harrop's Trusts* (1), nor in *In re Wright's Trusts* (2), nor in *In re Wootton's Estate.* (3) In *In re Smith* (4) the beneficiaries were made respondents by the direction of the Court, but in that case one of the trustees was the solicitor to the trust.

If, however, the Court is of opinion that the respondent beneficiaries ought to be before the Court, then it is submitted that inasmuch as their interests were not adverse to those of the petitioners they ought to have been made co-petitioners: *In re Osborne's Estate.* (5)

In any case if they are ordered to receive costs, the costs ought to be limited to 30*s.*: Rules of the Supreme Court, Order LXV., r. 27, sub-r. 19; *In re Artizans' and Labourers' Dwellings Improvement Act*, 1875, *Ex parte Jones* (6); *In re Olive's Estate* (7); *In re Ruck's Trusts.* (8)

L. F. Potts, for the petitioners, and *Ashton Cross*, for the respondent beneficiaries, were not called upon.

(1) (1883) 24 Ch. D. 717.
(2) (1883) 24 Ch. D. 662.
(3) [1890] W. N. 158.
(4) (1888) 40 Ch. D. 386.
(5) [1878] W. N. 179.
(6) (1880) 14 Ch. D. 624.
(7) (1890) 44 Ch. D. 316.
(8) (1895) 13 R. 637.

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WARRINGTON J. (after stating what was the object of the petition and who were the petitioners). The petition was served on the tenant for life of the other moiety of the settled estate and on the persons beneficially interested in remainder. These respondents appeared by the same counsel and solicitors and no extra costs were therefore incurred. The railway company now objects to pay the costs of these respondents. I propose to deal with the matter as if the only respondent to the petition was the respondent tenant for life. It seems to me that the petition would not be properly presented by the trustees for the purposes of the Settled Land Acts alone. I think that although the Court might have ordered the money to be paid out to the trustees, as is shewn by *In re Smith* (1), yet it might have refused to do so, and in that case the petition would have had to stand over. The petitioners knowing that served the petition on the respondent tenant for life. In my opinion the respondent tenant for life was properly made a respondent and the costs ordered to be paid by the railway company must include her costs.

Two further objections were taken on behalf of the railway company. The first was that these respondents ought to have joined with the petitioners as co-petitioners. The answer to that objection is that a person who has an independent interest cannot be compelled to appear by the same solicitors as the petitioners. The second objection was that it was unnecessary for these respondents to appear at all, that the petitioners ought to have tendered them 30*s*. as provided by Order LXV., r. 27, sub-r. 19, and that therefore their costs ought to be limited to that sum. I do not follow that contention. It seems to me that the appearance of the respondent tenant for life was or might have been necessary, and that without her interest being represented it is quite possible that the Court might have refused to order the money to be paid out to the trustees for the purposes of the Settled Land Acts. When, as in this case, one of the tenants for life is a trustee, there is all the more reason why the other tenant for life should appear separately. In my opinion the order must go as prayed, but the costs to be paid by the railway

(1) 40 Ch. D. 386.

company must include the costs of the respondent tenant for life, and the order will be dated to-day.

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Solicitors: *Philpot & Co., for T. B. Cox, Nottingham; Wood & Wootton; Cooper & Co., for Davies, Sanders & Swanwick, Chesterfield.*

W. I. C.

In re MAGRATH. HISTED *v.* QUEEN'S UNIVERSITY OF BELFAST.

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June 20, 24.

[1913 M. 765.]

Charity—Bequest to Queen's College, Belfast, to found Scholarship—Dissolution of College and Incorporation of Queen's University of Belfast before Date of Will—Legatee, whether sufficiently described—Irish Universities Act, 1908 (8 *Edw.* 7, *c.* 38).

Testatrix, by her will dated February 16, 1910, bequeathed 3000*l.* to "Queen's College, Belfast," to found a "Magrath Clinical Scholarship for proficiency in reports of cases at the bedside and to be open to medical students of the fourth year who shall be bona fide students at such college." On October 31, 1909, "Queen's College, Belfast," had been dissolved under the provisions of the Irish Universities Act, 1908, and by virtue of a charter under the same Act the "Queen's University of Belfast" had been incorporated, and at the date of the will and the death was carrying on substantially the same work in the same place as the former body. There was no evidence whether the testatrix was or was not aware of the dissolution of "Queen's College, Belfast," or of the incorporation of the "Queen's University of Belfast":—

Held, that for all practical purposes connected with the legacy the two institutions were identical; that under the circumstances (the case being treated as one of misdescription of the legatee) the "Queen's University of Belfast" was sufficiently referred to by the words of the will; and that the legacy took effect in its favour.

Coldwell v. *Holme* (1854) 2 Sm. & Giff. 31, followed.

ADJOURNED SUMMONS.

Mrs. Fanny Magrath, widow of Dr. Magrath, by her will dated February 16, 1910, after appointing executors and trustees thereof and making various bequests, bequeathed as follows: "I bequeath the following pecuniary legacies subject to all duties thereon that is to say: (*a*) 3000*l.* to Queen's College, Belfast. (*b*) 3000*l.* to University College, Gower Street, London. And I

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direct that such two last mentioned legacies shall carry interest at the rate of 3*l.* per centum per annum from the date of my death until the payment thereof. And I declare that the receipt of the treasurer or other proper officer for the time being of each of the said colleges shall be a sufficient discharge to my trustees for the legacy hereby bequeathed to such college and the interest thereon but that each of such legacies shall upon the receipt thereof be invested in the names of such persons as the council or other governing body of the college to which it is bequeathed shall appoint and that the income thereof shall be applied under the direction of such council or governing body and subject to such regulations as they may prescribe in awarding an annual scholarship to be called the 'Magrath Clinical Scholarship' for proficiency in reports of cases at the bedside and to be open to medical students of the fourth year who shall be bona fide students at such college." The testatrix then, after making other pecuniary bequests, devised the residue of her real and personal estate to her trustees upon trust to sell and convert and to hold the proceeds upon certain trusts for the benefit of Mrs. Norah Fiddes and her children.

The testatrix made five codicils to her will dated respectively November 26, 1910, April 19, 1911, October 7, 1911, January 4, 1912, and March 29, 1912, by each of which, after making immaterial alterations, she confirmed her will.

The testatrix died on May 11, 1912.

Prior to the date of the will both Queen's College, Belfast, and University College, Gower Street, had been dissolved.

The present summons was taken out by the executors of the will asking (inter alia) (1.) that it might be determined whether the legacy of 3000*l.* bequeathed by the will to Queen's College, Belfast, for the purposes therein mentioned had lapsed by reason of the dissolution of the college in the lifetime of the testatrix, and (2.) if the said legacy had not lapsed whether the same was payable to the Queen's University of Belfast, or ought to be applied cyprès, or how the same ought to be dealt with.

As regards the legacy to University College, Gower Street, London, no question arose. The University College London (Transfer) Act, 1905 (5 Edw. 7, c. xci.), contained a provision

(s. 14) that any will or other testamentary document whether made before or after the passing of the Act which contained any bequest, gift, or trust in favour of the corporation of the college, the college, the hospital, the medical school, or the boys' school should not fail by reason of the dissolution of the corporation of the college or of anything in the Act, but should be read and have effect as if it had been made in favour of (*a*) the university for the purposes of the college or (*b*) the corporation of the hospital or (*c*) the corporation of the boys' school according to the purpose and intent thereof.

Queen's College, Belfast, was founded in the year 1845 by Act of Parliament and Royal Charter and afforded education to students in medicine and other faculties. Such students were eligible for degrees granted originally by the Queen's University of Ireland and subsequently on the dissolution of that body in 1879 by the Royal University of Ireland. Dr. Magrath, the husband of the testatrix, had been a student at Queen's College, Belfast, and graduated as M.D. at the old Queen's University of Ireland in 1872 and on the dissolution of that body held a similar degree in the Royal University of Ireland.

By the Irish Universities Act, 1908 (8 Edw. 7, c. 38), which received the Royal assent on August 1, 1908, it was enacted (s. 1, sub-s. 1) that His Majesty might, if pleased to do so, by charter, found two new universities in Ireland, those universities respectively to have their seats at Dublin and Belfast, and (s. 1, sub-s. 2) that the two universities should be bodies corporate under such names respectively as His Majesty might determine, and that the governing bodies of the universities should, until the expiration of five years from the date appointed for the dissolution of the Royal University of Ireland, consist of such number of persons nominated by His Majesty as His Majesty should determine, and after the expiration of that time should be constituted in manner provided by the First Schedule to the Act. Sub-s. 3 of s. 1 enacted that the Royal University of Ireland and Queen's College, Belfast, should be dissolved as from the day appointed. Sect. 4 provided for the making of statutes as respects the new university having its seat at Belfast by the Belfast Commissioners appointed under the Act, and s. 6 named certain persons who were to act as such Commissioners.

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Sect. 13 was as follows: "(1.) Every person who, at the time of the dissolution of the Royal University of Ireland, is a graduate of the university, shall be entitled— . . . . (*b*) if he was a matriculated student at Queen's College, Belfast, ... to be registered as a graduate, with the corresponding degree of the new university having its seat at Belfast; . . . . (3.) All terms kept and examinations passed by any graduate or student of the Royal University of Ireland shall, on the dissolution of that university, be deemed to be terms kept and examinations passed at the university at which he is entitled to be registered as a graduate, if a graduate, and, in any other case, at either of the two new universities at the election of the student, and the governing body of each of the two new universities shall, so far as practicable, provide for any such students obtaining degrees on conditions not more onerous than those under which they could obtain corresponding degrees in the Royal University of Ireland."

Sect. 14 enacted (sub-s. 1) that the buildings of the Royal University of Ireland and of Queen's College, Belfast (together with the equipment and appurtenances thereof), should be transferred to and become vested in the new university having its seat at Dublin and the new university having its seat at Belfast respectively, and (sub-s. 2) that the Commissioners under the Act might jointly make a scheme "(*a*) For transferring to one or other of the new universities any property, real or personal, of the Royal University of Ireland or Queen's College, Belfast (including trust property), not transferred by virtue of the foregoing provisions of this section: (*b*) For transferring to one or other of the new universities any rights, powers, liabilities, or obligations of the Royal University of Ireland or Queen's College, Belfast, or any members or officers thereof, or attaching to the property thereof: (*c*) For making any alteration in the terms of any trust which may be rendered necessary or proper in consequence of the dissolution of the Royal University of Ireland or Queen's College, Belfast; Provided that the scheme shall make provision that any property held in trust solely for Queen's College, Belfast, shall be transferred to the new university having its seat at Belfast."

Sect. 20 provided that the Act should come into operation on

such day, not being more than two years from the passing thereof, as the Lord Lieutenant might appoint, and that different days might be appointed for different purposes and for different provisions of the Act.

By Royal Letters Patent dated December 2, 1908, King Edward VII. granted a charter to the Queen's University of Belfast whereby the university was duly incorporated under that name. The charter provided (clause II.) that "the university shall have the powers following— . . . . (5.) To accept from donors gifts of money, lands, or other property, for the foundation of professorships, lectureships, studentships or scholarships, or for the erection of buildings, or for the endowment of research, or for any other purposes connected with the university . . . ." and (clause XXVII.) that the provisions of the charter giving the powers of the University of Belfast should not come into operation until the day appointed under the Act of 1908 for the dissolution of the Royal University of Ireland and Queen's College, Belfast, except so far as the Lieutenant-General and General Governor of Ireland might by order appoint; and that until the day appointed as aforesaid there should be no members of the university save the members of the first governing body.

The statutes of the Queen's University of Belfast provided (cap. XVI.) that there should be in the university a faculty of medicine.

On October 21, 1909, the Lord Lieutenant of Ireland by order appointed October 31, 1909, as the date for the dissolution of Queen's College, Belfast, pursuant to sub-s. 3 of s. 1 of the Act of 1908, and on November 29, 1909, the Commissioners under the Act made a scheme for transferring to the Queen's University of Belfast the property of Queen's College, Belfast, including trust property other than the buildings of the college, and directed that all property, securities, goods, chattels, debts, or moneys held by any person or persons of the said college or applicable to the purposes thereof should from and after the date of the scheme be delivered, transferred, and paid to the Queen's University of Belfast.

There was evidence that at the date of the execution of the

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will the Queen's University of Belfast was in ordinary conversation habitually referred to as Queen's College, Belfast. There was no evidence whether the testatrix was or was not aware of the dissolution of Queen's College, Belfast, or of the incorporation of the Queen's University of Belfast.

H. F. F. Greenland, for the summons.

T. H. Carson, K.C., and *J. A. Strahan*, for the Queen's University of Belfast. It is submitted that the Queen's University of Belfast is entitled to the legacy of 3000*l.* bequeathed to Queen's College, Belfast. Put aside for the moment the fact that there formerly existed a body called "Queen's College, Belfast," which accurately corresponded with the description of the legatee in the will. If so it is a case of misdescription, and the Queen's University of Belfast takes the legacy. The university is in effect the same institution as "Queen's College, Belfast," with a change of name and of constitution. At the date of the will and of all the confirming codicils there was no institution in Belfast technically entitled to, and which could be accurately described by, the name of Queen's College, Belfast. There was a body, the Queen's University of Belfast, which was habitually referred to in ordinary conversation as Queen's College, Belfast. This institution was the only existing body in Belfast which was entitled to, or did in fact, use the term "Queen's" as part of its name. From the words of the will the legacy was intended to benefit medical students who were getting medical training at some institution at Belfast ("Queen's" being part of its name) and whose course of training extended over a period of at least four years and was intended to be a scholarship. At the date of the will and the codicils there was at Belfast an institution which trained medical students, which insisted on a course of five years, which could hold and award scholarships and part of the name of which was "Queen's." In view of these facts there can be no doubt that in giving the benefit of the legacy to the Queen's University of Belfast the Court would be carrying into effect the intention of the testatrix. Dealing solely with the facts at the date of the will and the codicils it is submitted that

the inaccuracy of referring to a college instead of a university will not prevent the Court from giving the legacy to the university. A slightly inaccurate description of a corporation as an object of a gift will not prevent its taking effect: *Queen's College* v. *Sutton.* (1)

It is, however, objected that some time before the date of the will there had existed a body which in fact corresponded accurately with the description of the legatee in the will. We submit that this makes no difference. It is true that there is a line of decisions dealing with the case where a charity existing at the date of the will has ceased to exist at the death of the testator, in which an effort was always made to argue that, notwithstanding this fact, effect should be given to a general charitable intention of the testator. As to this it is now settled by the Court of Appeal that the doctrine of lapse applies as in the case of individuals: *In re Rymer.* (2) But in nearly all those cases the body was existing at the date of the will and ceased before the death: *In re Rymer* (2); *In re Davis.* (3)

In *In re Ovey* (4) the body to which the legacy was given had ceased to exist before the date of the will and the legacy was held to have lapsed. But in that case there was not at the date of the will any institution which particularly corresponded with the description of the legatee in the will. In the present case a similar body really differing only in name did exist at the date of the will. Such a case came before Stuart V.-C. in 1854 in *Coldwell* v. *Holme* (5), who decided in favour of the legatee. That case governs the present. The Court ought not in the present case to assume that the testatrix was ignorant that Queen's College, Belfast, had been dissolved. It is submitted therefore that the Court ought to treat the present case as one of misdescription of the legatee and to hold that "Queen's College, Belfast," is a sufficient description of the "Queen's University of Belfast."

Austen-Cartmell, for the Attorney-General. I adopt the same argument. If, however, the Court is of opinion that it

(1) (1842) 12 Sim. 521.
(2) [1895] 1 Ch. 19.
(3) [1902] 1 Ch. 876.
(4) (1885) 29 Ch. D. 560.
(5) 2 Sm. & Giff. 31.

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cannot give the legacy directly to the university it can apply it cyprès. The paramount intention of the testatrix as shewn by her will was to found a clinical scholarship at Belfast, and this she proposed to do through the medium of Queen's College, Belfast. The college was, therefore, intended by the testatrix to be a trustee of the legacy, and the Court will not allow a legacy to fail for want of a trustee. If the intention of the testatrix cannot be carried out in the manner prescribed by her will the Court will direct the legacy to be applied cyprès. The authorities on the point are summed up by Parker J. in *In re Wilson*. (1)

Cave, K.C., and *H. B. Bompas*, for the residuary legatees. The main point in this case is one of construction: to whom did the testatrix intend to give this legacy of 3000*l.*? To determine this point the Court is entitled to know the facts as existing at the date when the testatrix made her will, or, as has been said, to put itself in the testatrix's armchair. The testatrix knew of Queen's College, Belfast, very well. Her husband had been educated there, and it is submitted that she intended to benefit the institution at which he had been educated. During a short period prior to the making of her will Queen's College and Queen's University were both in existence. The Queen's University of Belfast came into existence for some purposes on December 2, 1908. Queen's College, Belfast, was not dissolved till October 31, 1909. The Queen's University of Belfast was by the terms of the Act of 1908 a new body and not a successor of Queen's College, Belfast. There is no evidence that the testatrix knew of the existence of the new body. The dissolution of Queen's College, Belfast, only took effect a few months before the date of the will. The onus is not on the residuary legatees to prove the ignorance of the testatrix of the existence of the new body. The decision in *Coldwell* v. *Holme* (2) which has been relied on did not proceed upon any question of succession as has been suggested, but upon the question of intention who was the intended legatee. Stuart V.-C. there held that he could not assume that the testatrix was ignorant that the institution in question had ceased to exist.

(1) [1913] 1 Ch. 314. (2) 2 Sm. & Giff. 31.

There was there some evidence that the testatrix had been a subscriber to the institution and she must therefore have been aware that the institution had ceased to exist. Here until three months before the date of the will it would have been correct to describe the legatee as Queen's College, Belfast. There being here no subscriptions or reports, as in the case of a charity, the fact that the institution had ceased to exist could only have been brought home to the testatrix by direct communication. There is therefore no reason on the evidence for supposing that the testatrix had ever heard of the dissolution of Queen's College, Belfast.

In re Ovey (1) is in our favour. There the Court held that the testator intended the legacy for a particular hospital which had ceased to exist before the date of the will and that the legacy could not therefore be applied cyprès. In the present case the testatrix was referring to something which existed in the past, as is shewn by the gift to University College, Gower Street. It is a matter of fair inference that the testatrix meant to benefit the two old institutions of which her husband had been a distinguished member. If therefore she intended to make a gift to Queen's College, Belfast, there is a lapse. A gift to an institution which is non-existent at the date of the will lapses. There is here no general charitable intention, but a particular charitable intention to found a scholarship at Queen's College, Belfast, and inasmuch as that institution had ceased to exist before the date of the will the legacy lapses: *In re Rymer.* (2)

[WARRINGTON J. There the gift was for the general purposes of the institution.]

There is no difference. The charitable purposes may be regarded as the real objects of the charity. If a gift is to be enjoyed in connection with a particular institution which has ceased to exist the Court cannot give effect to it: *In re University of London Medical Sciences Institute Fund.* (3) *In re Wilson* (4) is very much in point.

It is said that there were five codicils to the will, each of

(1) 29 Ch. D. 560.
(2) [1895] 1 Ch. 19.
(3) [1909] 2 Ch. 1.
(4) [1913] 1 Ch. 314.

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which confirmed the will. But the confirmation by codicil of a will is merely a confirmation of the gifts in the will. A codicil whether purporting to confirm a will or not does not revive a legacy already lapsed by the death of the legatee: *In re Rymer* (1); *Hutcheson* v. *Hammond.* (2) It does not therefore affect the matter that the testatrix confirmed her will. It is the same gift given over again.

[WARRINGTON J. No; but the codicils shew that the testatrix was reconsidering her testamentary dispositions over a long period, during which she may have known of the creation of the "Queen's University of Belfast."]

WARRINGTON J. In this case the testatrix, who died on May 11, 1912, and who made her will on February 16, 1910, by that will made two bequests, the first of 3000*l.* to Queen's College, Belfast, and the second of 3000*l.* to University College, Gower Street, London. Then the will proceeded: [His Lordship read the provisions as to the investment and application of the legacies, and continued:] At the date of the will there existed no such institution as Queen's College, Belfast, and no such institution as University College, Gower Street, London. University College, Gower Street, had been dissolved on the reconstitution of the University of London, and had received a different name; but fortunately in that case the University College London (Transfer) Act, 1905, had provided that the legacies given to University College, Gower Street, should be held to be given to the new body. Queen's College, Belfast, had at the date of the will ceased to exist by virtue of the Irish Universities Act, 1908, and proceedings taken thereunder; but that Act for some reason or other did not contain a similar provision. At the date, therefore, of the will there was no such institution as Queen's College, Belfast, but there was an institution called the Queen's University of Belfast, and the latter was so constituted that it was capable of receiving such a bequest as the present, and of founding a scholarship for the purpose for which the bequest had been made.

Now I think, but for facts which I am about to mention, that

(1) [1895] 1 Ch. 19, 26. (2) (1790) 3 Bro. C. C. 128.

if this had been an ordinary case of a bequest to a charity with a mistake as to the name there could be little doubt that the Court would have held that by the bequest to Queen's College, Belfast, the testatrix ought to be taken to have meant the Queen's University of Belfast. But that does not dispose of the present case, for the reason that here there had been at one time an institution accurately described as "Queen's College, Belfast." I have therefore to determine whether under these circumstances the bequest can take effect in favour of the Queen's University of Belfast.

The facts are these. The testatrix Fanny Magrath was the widow of Dr. Magrath. Dr. Magrath had been educated for his profession at Queen's College, Belfast, and at University College, Gower Street, and he had been a graduate of the Royal University of Ireland. It is pretty obvious, therefore, when one knows those facts, that the intention of the testatrix was to found scholarships in connection with the two places at which her husband had received his medical education. On August 1, 1908, there was passed the Irish Universities Act, 1908. At the time of the passing of that Act there existed two bodies affected by it, first the Royal University of Ireland, and secondly Queen's College, Belfast. The object of the Act was to enable His Majesty, if he pleased, to found two new Irish universities, one to have its seat at Dublin and the other to have its seat at Belfast, and it was provided that on the appointed day, if His Majesty should determine to found those two universities, the two bodies, the Royal University of Ireland and Queen's College, Belfast, should be dissolved. The Act contained a number of provisions dealing in particular with the status of the new bodies and the property formerly belonging to the two other bodies which would be dissolved. It is sufficient to mention that Commissioners were appointed for the purpose of settling details regarding that property; but the general intent of the Act was that all property previously belonging to Queen's College, Belfast, should in future belong to the Queen's University of Belfast. Provisions were also included in the Act dealing with the status of students and graduates of the two bodies which were to be dissolved, and the effect of those provisions was that all graduates of the Royal

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University of Ireland who had matriculated at Queen's College, Belfast, should be entitled to be registered as graduates of the Queen's University of Belfast. Accordingly Dr. Magrath, if he had lived, would have been a graduate of the new university, he having matriculated at the old Queen's College, and having been a graduate of the old university. His connection, therefore, with the educational body now reconstituted as a new entity and with a new name would have continued as if the dissolution of the old body had not taken place. On December 2, 1908, His Majesty was pleased to grant a charter for the constitution of the two new bodies, a university to have its seat at Dublin and the Queen's University of Belfast; and on October 31, 1909,—that is, after an interval of some eleven months,—the appointed day arrived, and Queen's College, Belfast, was dissolved. Queen's College, Belfast, was dissolved, therefore, a few months before the testatrix made her will.

Now, those being the facts, can I hold that the gift to Queen's College, Belfast, takes effect in favour of the university? For all practical purposes the two bodies are the same. They are not, of course, in law the same, because the one has been dissolved and a new entity has been created; but for all practical purposes the two bodies are identical. Of course there are minor variations in the circumstances and so forth; but, as I say, for all practical purposes connected with this legacy the two bodies are the same. It does not appear one way or the other whether the testatrix knew, or did not know, what had taken place. If she knew what had taken place the case becomes merely one of misdescription. She may have known in a vague sort of way that something had happened in connection with the Irish universities, and not have known, or have forgotten, what was the name of the new body constituted under the new circumstances, or even that any new body had actually been constituted at all. There is no evidence one way or the other as to whether she knew or did not know.

A very similar case—*Coldwell* v. *Holme* (1)—came before Stuart V.-C. in the year 1854. In that case Mary Satterthwaite, among other charitable legacies, bequeathed "the sum of 200*l.* to

(1) 2 Sm. & Giff. 31.

the treasurer of The Benevolent Institution for the delivery of poor married women at their own habitations." There had existed prior to the year 1836 a society called by a name almost identically the same, "The Benevolent Institution, for the sole purpose of delivering poor married women at their own habitations." The testatrix had been a subscriber to that institution, and there was evidence that she had recommended poor married women to a society of which she was a member. That must have been that particular society. But in the year 1836 that society had come to an end, and at the date of the testatrix's will in 1846, ten years later, there was no such society in existence. There was, however, in existence an old society founded nearly one hundred years before, called "The Royal Maternity Society for delivering poor married women at their own habitations." It did not appear that the testatrix had ever heard of it, still less that she was ever a subscriber to it. The legacy was claimed by that society and Stuart V.-C. held that they were entitled to it. He said (1): "There is a clear gift for the benefit of a charitable institution, for delivering poor married women at their own habitations, and there is in existence such an institution. So far, the bequest is free from all ambiguity." That is to say, so far as its name was concerned, the Court would have done in that case what I have said I should have done in this case, namely, have held that the legacy took effect in favour of the existing institution. The Vice-Chancellor continued: "But a doubt is created by the fact, that there was formerly, though it no longer exists, a similar institution for precisely the same charitable purpose, the name of which more exactly answers the description in the will than the present claimant, and of which the testatrix was herself a member. The doubt arises from the circumstance, that, if both societies were now in existence, and both claimants, the non-existent society, as more accurately described, would be entitled. The dissolution of that society being before the date of the will, leaves but one claimant. It would be proceeding on a very unsound principle, in a case in which there is and was at the date of the will but one society at all answering the description, if, in the absence of any evidence

(1) 2 Sm. & Giff. 34.

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to justify such a conclusion, I were to assume that the testatrix was ignorant that the society of which she had been a member had been dissolved, and ignorant also that there was a society in existence similar in name and identical in purpose. I do not think there is the least evidence to warrant such an assumption. I think, therefore, that the present claimants, being sufficiently described, are entitled to the legacy, and that, were I to hold otherwise, I should be defeating the intentions of this benevolent lady." Now in this case also it seems to me that, though there is no evidence that the testatrix knew what took place, I cannot assume on the evidence before me that she was ignorant; and if she was not ignorant, then according to ordinary principles of construction the case must be treated as one of mere misdescription of the name. I think therefore that I must hold, following *Coldwell* v. *Holme* (1), that the university, being sufficiently described, is entitled to the legacy; and say, adopting the language of Stuart V.-C. in that case, that I am satisfied that if I held otherwise I should be defeating the intentions of this benevolent lady who clearly intended to found a scholarship at the educational institution at which her husband was educated, and that for all practical purposes that institution is the Queen's University of Belfast. I accordingly declare that the legacy of 3000*l.* bequeathed by the will of the testatrix to Queen's College, Belfast, has not lapsed but is payable to the Queen's University of Belfast.

Solicitors: *Loughborough, Gedge, Nisbet & Drew, for Pearless, Sons & de Rougemont, East Grinstead; Metcalfe & Sharpe, for R. T. Martin, Belfast; Treasury Solicitor.*

(1) 2 Sm. & Giff. 31.

W. I. C.

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In re WEST.
WESTHEAD *v.* ASPLAND.

[1912 W. 793.]

Will—Construction—Legacy—Interest—Legacy payable at Twenty-one—Power to Trustees to apply Legacy in or towards Maintenance of Legatee—Additional Funds provided for Maintenance.

Testatrix, by her will as altered by a first codicil thereto, bequeathed a legacy of 900*l.* to her grand-niece A. A., if she should attain the age of twenty-one years, but so that the trustees should be at liberty in their absolute discretion to apply the whole or any portion of it in or towards her maintenance and education. The testatrix also by her will made provision for the maintenance and education of A. A. out of other funds, and by a fourth codicil thereto she bequeathed to her all the money standing to the credit of her current or deposit account and devised to her a freehold house. A. A. was an infant of the age of thirteen years:—

Held, that, the testatrix having made provision for the maintenance and education of A. A. out of other funds, the legacy of 900*l.* only carried interest from the time when she attained the age of twenty-one years.

Pett v. *Fellows* (1733) 1 Swans. 561, n., as explained by Sugden L.C. in *Leslie* v. *Leslie* (1835) Ll. & G. t. Sug. 1, 3, and *In re Churchill* [1909] 2 Ch. 431, distinguished.

Adjourned Summons.

Mrs. Martha Ellen West, by her will dated September 19, 1907, by clause 5 bequeathed the sum of 450*l.* to each of her grand-nieces, Alice E. F. Aspland and Amy Aspland, if they should respectively attain the age of twenty-one years, but so that the trustees should be at liberty in their absolute discretion to apply the whole or any portion of the legacies in or towards their maintenance and education. Then, after giving other benefits to her two grand-nieces, she devised and bequeathed the residue of her real and personal estate to her trustees upon trust to divide the same equally between such of the following three persons as should be living at her decease, namely, Elizabeth Drew, Alice E. F. Aspland, and Amy Aspland, and provided that with regard to shares of the two latter the same should be

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subject to the same directions and declaration as were declared by clause 5 concerning the two legacies of 450*l.*

By a first codicil to her will, dated December 9, 1909, the testatrix, after reciting the death of Alice E. F. Aspland, declared that clause 5 of her will should be varied so as to read as follows: "I bequeath the sum of 900*l.* free of legacy duty unto Amy Aspland if she shall attain the age of twenty-one years but so that my executors shall be at liberty in their absolute discretion to apply the whole or any portion of the said legacy in or towards the maintenance and education of the said Amy Aspland with power either themselves so to apply the same or to pay the same to the person or persons in whose custody or power she shall be for the time being whether such person or persons shall be the legal guardians of the said Amy Aspland or not without being bound to see to the application thereof and so that in the event of the said Amy Aspland dying before the age of twenty-one years the legacy hereby bequeathed to her or such part thereof as shall not have been applied in or towards her maintenance and education shall go into and form part of my residuary estate."

By a third codicil to her will, dated April 11, 1911, the testatrix revoked the gift of the residue contained in her will and directed that her trustees should stand possessed thereof upon trust for Amy Aspland if she should attain the age of twenty-four years.

By a fourth codicil to her will, dated January 22, 1912, the testatrix bequeathed to Amy Aspland all the money which at her death should be standing to the credit of her current or deposit account and devised to her the freehold of the house in which the testatrix then resided.

The testatrix died on February 7, 1912.

At the date of her death the amount of the aggregate sum standing to the credit of her current and deposit account at her bankers' was 3709*l.* 19*s.* 1*d.* and the estimated value of the freehold house was 600*l.*

There was some doubt whether the estate would produce sufficient to pay in full the numerous legacies bequeathed by the will.

Amy Aspland was an infant of the age of thirteen years,

This was a summons taken out by the independent trustee for the determination of the question (inter alia) whether the legacy of 900*l.* bequeathed by clause 1 of the first codicil to Amy Aspland carried interest from the death of the testatrix or only from the end of one year after her death or from some and what other date.

Wilfrid Hunt, for the summons.

E. M. Winterbotham, for the defendant Amy Aspland. The legacy of 900*l.* carries interest from the death of the testatrix because maintenance is given out of it. I do not rely on the fact of the testatrix having been in loco parentis to the legatee. No doubt the general rule is that a contingent legacy or a legacy payable at a future date does not carry interest until the time for payment. There is, however, an exception to that rule where a general intention is expressed of providing for the maintenance of the legatee out of the legacy, in which case interest runs from the death: Theobald on Wills, 7th ed. at p. 191; *Pett* v. *Fellows* (1); *Leslie* v. *Leslie* (2); *In re Churchill.* (3) The present case falls within that exception.

Clauson, K.C., and *Wright Taylor*, for Thomas Aspland, one of the pecuniary legatees, who, in view of the fact that the estate would probably not be sufficient to pay the pecuniary legacies in full, in effect represented the residuary estate. The principle to be applied in this case is correctly stated in Jarman on Wills, 6th ed. p. 1114: "If a legacy is bequeathed to an infant by a testator who is not its parent or in loco parentis to it, and the will expressly or impliedly shews an intention to provide for its maintenance, interest is allowed from the death of the testator, unless maintenance is available from some other source." No doubt if a legacy contingent on attaining majority is given with an indication that the legatee is to be maintained by means of that legacy during infancy, the intention that the legacy should carry interest during infancy must be implied; otherwise the testator's desire as to the maintenance of the infant will be frustrated. We do not question *In re Churchill* (3), which was

(1) 1 Swans. 561, n. (2) Ll. & G. t. Sug. 1, 3.
(3) [1909] 2 Ch. 431.

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obviously rightly decided. In that case the legacy was the only benefit conferred on the legatee by the will. But here funds other than the legacy of 900*l.* were given by the will and are available for maintaining the infant. The reason, therefore, for implying that interest on the legacy should run during the minority vanishes, since the testatrix's intention that the infant should be maintained will be effectually carried out whether the 900*l.* legacy carries interest or not.

G. M. Simmonds and *L. M. May*, for other parties not interested in this question.

WARRINGTON J. The question in this case is whether a particular legacy which is contingent on the legatee attaining twenty-one years carries interest from the date of the death of the testatrix or from the date when the legatee attains twenty-one years. Prima facie such a legacy would not carry interest until the legatee attains twenty-one years. But the testatrix in this case has added to the gift of the legacy this provision: "but so that my executors shall be at liberty in their absolute discretion to apply the whole or any portion of the said legacy in or towards the maintenance and education of" the legatee.

The question is whether interest is payable notwithstanding that the legacy itself is not payable until a future date by reason of the discretion given to the executors to apply the legacy for the benefit of the legatee. If it were not shewn that there was other provision made by the will for the maintenance of the legatee there would be an expression of intention that the legatee was to be maintained out of the legacy and consequently the legacy would carry interest from the death. That I think follows from *Pett* v. *Fellows* (1) as explained by Sugden L.C. in *Leslie* v. *Leslie* (2), and *In re Churchill.* (3) But that is not quite the question which arises here, because in those cases no other provision was made for the maintenance of the legatee, and the testator consequently shewed an intention that the legatee should be maintained out of the particular legacy and out of the particular legacy alone. Those cases do not apply to the present

(1) 1 Swans. 561, n. (2) Ll. & G. t. Sug. 1, 3.
(3) [1909] 2 Ch. 431.

case because the testatrix here has made other provisions for the maintenance of the legatee, for example, the gift of the bank balances of 3709*l.* 19*s.* 1*d.* which is not dependent on her attaining the age of twenty-one years. That I think distinguishes the present case from those cases.

The real question is, Can the intention that the legacy should carry interest, which is presumed where a testator merely gives a future legacy with a power to the executors to maintain the legatee out of the legacy, also be presumed in a case where the testator in addition to such a future legacy makes provision for the maintenance of the legatee out of some other fund? I think not.

I hold, therefore, that the legacy only carries interest from the time when the legatee attains the age of twenty-one years.

Solicitors: *Terrell & Varley; the Official Solicitor; Peacock & Goddard, for Rowland & Hutchinson, Croydon.*

W. I. C.

HOPE *v.* OSBORNE.

[1912 H. 865.]

Manor—Rights of Common—Turbary—Estovers—Nuisance—Abatement—Excessive Trespass—Cutting down Trees—Injunction—Damages.

The commoners of a manor may abate a nuisance, which wholly excludes them from exercising their rights of common over the lord's waste, without first resorting to the Courts for relief. But if the nuisance only amounts to a partial exclusion, a sufficiency of common being left for the exercise of common rights, the commoners ought not to take the law into their own hands: their proper remedy is to apply to the Courts for a declaration of their rights. This rule applies whether the right of common alleged to be infringed is for common of pasture, or of turbary, or of estovers.

Where therefore tenants of a manor in assertion of a claim to common of turbary and of estovers over certain heath lands, alleged to be waste of the manor, entered on the heath lands and cut down trees, there being sufficient heath lands for the exercise of the rights claimed, if any:—

Held, that the trespass was unjustifiable and that the lord was entitled to an injunction and damages.

The principle of *Sadgrove* v. *Kirby* (1795) 6 T. R. 483, applied.

WITNESS ACTION.

This was an action by the lord of a manor to restrain certain

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persons from trespassing on his lands in the assertion of alleged rights of common under the following circumstances.

The plaintiff was the tenant in fee simple in possession of a property, known as the Valley Farm, situate in the parish of Hollesley in the county of Suffolk, which comprised (inter alia) two parcels of heath land, respectively known as "the Great Heath" and "the Further Heath." The property was formerly copyhold of the manor of Hollesley-cum-Sutton, but had been enfranchised in 1866. The plaintiff bought the property in 1903, and in the following year he purchased the manor of Hollesley-cum-Sutton. The parcels of heath land contained together about 420 acres. They were not enclosed, but their boundaries were well defined, and there was an ancient custom for such of the inhabitants of the parish of Hollesley as were tenants of the manor to enter upon and cut and take from the said heath lands such quantities of furze and ling as they might require for fuel.

In January, 1912, a controversy arose between the plaintiff and the parish council of Hollesley, acting on behalf of the Hollesley commoners, with respect to the letting by the plaintiff of the sheep feed on the said heath lands, which letting the council alleged was an infringement of the rights of the commoners over the heath lands.

On March 12, 1912, at a meeting of the parish council, the chairman and others pointed out the importance to the parishioners of exercising their rights, and particular attention was drawn to the great number of trees grown upon the Further Heath, which it was said did damage to the heath, and it was resolved unanimously "That the commoners do cut some of the selfsame trees and meet at Duck Corner at 8.30 A.M. on Saturday the 16th of March, 1912." In pursuance of this resolution the defendants and a large number of other persons entered upon the Further Heath on March 16 and cut down a plantation of fir and birch trees twenty acres in extent, thereby doing damage to the estimated amount of 100*l*. Thereupon the plaintiff commenced this action against the defendants and claimed an injunction to restrain them and their servants and agents from trespassing upon the heath lands and from entering upon the

same except if and so far as they were tenants of the said manor and such entry was for the purpose of taking therefrom furze and ling as fuel.

The defendants by their defence alleged that the said heath lands were common or waste lands of the manor of Hollesley-cum-Sutton ; that if they did any of the acts complained of (which they denied) they did so for the purpose of maintaining and preserving their own rights and privileges over and concerning the heath lands and the rights and privileges over the heath lands of those persons for and on whose behalf they were acting at the time in question, and that such acts were necessary to the exercise and protection of the said rights and privileges. They further alleged that within the said manor there had been from time immemorial a custom for the copyhold and customary tenants of the manor to have as appurtenant to their respective copyhold and customary tenements common of pasture for their cattle on the said heath lands, and common of turbary to cut and take turves for fuel, and common of estovers and botes to take so much heath, gorse, wood, saplings, and underwood as might be required for fodder and litter for cattle and for fuel. They further alleged that the inhabitant owners or occupiers of tenements in the parish of Hollesley were respectively entitled by lost grant or by prescription to the same rights of common over the heath lands. They also alleged that, if the said heath lands were severed from the manor at any time prior to the acts complained of, the said rights and privileges had before such severance become united to the estate of the copyhold and customary tenants of the manor, and they justified their entry upon the heath lands and their acts thereon as such tenants and occupiers in their own right or as the agents of the other tenants and occupiers, and asserted that the plantations on the heath lands were wrongful and prejudicial to their said rights and privileges and that they were justified in cutting down the same.

The plaintiff by his reply denied the alleged rights of common, except the right to cut furze and ling, and pleaded that the statement of defence disclosed in law no defence to the action. Alternatively he alleged that there was sufficient of the said heath lands for the exercise by the defendants of all their rights (if

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any) upon the same without the commission of any of the acts of damage complained of. He also did not admit that the defendants were tenants of the manor.

The evidence is sufficiently noticed in the arguments and judgment.

Jenkins, K.C., and *Harry Dobb*, for the plaintiff. The plaintiff is the owner of the soil of the heath lands and has the exclusive right to the sheep feed on it. The point came before the Court in 1877 on a vendor and purchaser summons between predecessors in title of the plaintiff in the case of *In re Burroughs, Lynn and Sexton*. (1) A lord may enclose as much of the common as he pleases for tillage and wood ground provided he leaves common sufficient for those entitled to rights of common: Carson's Real Property Statutes, 2nd ed. p. 48. The plantation had existed for many years, and the defendants had no justification for cutting it down in assertion of their alleged rights. The defence is no answer to the plaintiff's action for the trespass committed. If they thought their rights were infringed, they ought not to have taken the law into their own hands, but should have brought an action against the lord: *Sadgrove* v. *Kirby* (2); *Arlett* v. *Ellis*. (3) They have not counterclaimed for a declaration of their rights. We do not admit that the defendants are tenants of the manor, and if evidence of the alleged rights of common is given we shall ask to adduce rebutting evidence.

A. H. Poyser and *Rowley Elliston*, for the defendants. In an unreported case of *Jackson* v. *Lennard*, which was tried before Cave J. at the Ipswich Assizes in 1897, the right of the Hollesley commoners to common of pasture and common of turbary over these heath lands was established. Jackson was the tenant of the then freeholder of this Valley Farm and it was an action for trespassing on the Further Heath.

[NEVILLE J. Assume that every allegation in your defence is provable, it seems to me that the question here is whether the acts complained of were justifiable.]

Then the issue is whether or not there was an excess in the

(1) (1877) 5 Ch. D. 601. (2) 6 T. R. 483.
(3) (1827) 7 B. & C. 346, 363.

assertion of the common rights. The whole point turns on the right of commoners to abate a nuisance that goes to the destruction of their common rights. The cases of *Sadgrove* v. *Kirby* (1) and *Arlett* v. *Ellis* (2) are not opposed to the right to abate a nuisance before bringing an action against the lord. Moreover, each of them dealt with common of pasture and the Statute of Merton (20 Hen. 3, c. 4) applied in each of them, and the question was whether the lord in approving had left sufficient common of pasture. But common of turbary and common of estovers are not within the Statute of Merton, and the principle that the commoner must first bring his action before he abates a nuisance does not apply to such rights of common. A commoner is entitled to every part of the waste for the exercise of such rights. Our evidence will go to shew that fir trees growing up destroy the heather and bracken beneath them, and that is destructive of the common rights and justifies the commoners in abating the nuisance by cutting down the trees in the defence of their rights. If a house is built on the waste, the commoners can, after notice given, abate the nuisance by pulling down the house even if it is occupied, without first bringing an action: *Glover* v. *Lane* (3); *Grant* v. *Gunner* (4); *Duberley* v. *Page* (5); *Fawcett* v. *Strickland* (6); *Shakespear* v. *Peppin* (7); *Davies* v. *Williams* (8); *Lane* v. *Capsey*. (9) Here there is a legal right to take turves and estovers from every part of the heath lands. The plantation was a nuisance which interfered with that right and the defendants were entitled to abate it. It is not a question of afforestation. This timber was of no value. The planting of the trees was done to provide cover for game.

[NEVILLE J. My present view is that the acts of the defendants were illegal; but assuming they have the rights pleaded they were not justified in what they did.]

The distinction lies between a claim to common of pasture

(1) 6 T. R. 483.
(2) 7 B. & C. 346, 363.
(3) (1789) 3 T. R. 445, 447.
(4) (1809) 1 Taunt. 435, 447.
(5) (1788) 2 T. R. 391.
(6) (1737) Willes, 57.
(7) (1796) 6 T. R. 741, 746.
(8) (1851) 16 Q. B. 546.
(9) [1891] 3 Ch. 411.

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and a claim to common of turbary and of estovers. A commoner is entitled to every part of the waste for his turves and estovers, and if he is prevented from exercising that right over one rood of the waste he can abate the nuisance.

[NEVILLE J. I think the real distinction is whether there is a total exclusion or only a partial exclusion from the exercise of the common rights.]

With respect, this is a case of total exclusion from a part and not a partial exclusion from the whole. Any deprivation from full enjoyment of a part entitles the commoner to abate.

Jenkins, K.C., in reply. The plaintiff does not ask for an inquiry as to damages. He leaves it to the Court and does not object to nominal damages.

NEVILLE J. My judgment involves no decision as to the existence or non-existence of the rights claimed by the defendants. I will suppose that there is a nuisance and that everything pleaded in the defence is true, but that in my opinion affords no justification for the acts complained of by the plaintiff. No doubt in a case like this public sympathy is aroused on behalf of those who are endeavouring to assert rights of which they believe themselves to be possessed and which they suppose are being infringed. But I think it is a matter of very great importance that it should be thoroughly understood that the occasions upon which people are entitled to take the law into their own hands with regard to rights of property are very few indeed. I think I should not be exaggerating if I said that in ninety-nine cases out of every hundred where people choose, instead of having their rights declared by the Court, to act upon what they suppose to be their rights and to injure property or commit acts of violence of any kind, they will find that they will have to suffer for it, and I think that in these days it is very important that every man and every woman in the kingdom should bear that constantly in mind.

In the present case the plaintiff is the lord of the manor in possession of the property in question, and, as the lord of the manor, he has a right to the soil of these two parcels of land, the Great Heath and the Further Heath, subject to the right of

the commoners to take furze and ling and any other rights that there may be over them. In one part of the Further Heath trees had been growing for some years, as long as fifteen years in some cases, and a plantation or belt of trees had grown up on the spot in question. Then certain persons, who I will assume for the purposes of my judgment were commoners and tenants of the manor and had common rights over these two heaths, thought, and I will assume thought justly, that the existence of these trees was injurious to their rights. Thereupon they collected a crowd of people and went up to the place in question and felled thousands of these trees, believing—I give them credit for that—that in so doing they were acting within their rights and were only doing what they were entitled to do. In my opinion in so supposing they made a great mistake, for, whether they had the rights claimed or not, in my opinion they could not be justified in taking the steps which they took. I take the law to be rightly stated by Grose J. in the case of *Sadgrove* v. *Kirby* (1), where, referring to Lord Mansfield, he says: "In *Cooper* v. *Marshall* (2) Lord Mansfield recognized the distinction between those nuisances that the commoner may, and those that he may not, abate; he said that a commoner may abate a nuisance that prevents his enjoying the right of common at all, as in the case in 2 Modern, 65 (3), but not such a nuisance as merely prevents his enjoying it in so beneficial a manner as he is entitled to . . . . and if a commoner complain that there was not a sufficiency of common left, it is reasonable that he should not cut down the trees, but should bring his action against the lord for abridging his right." I think it is quite clear here that, supposing these trees were a nuisance, they only affected the commoners in so far as they might possibly prevent them from enjoying their rights in so beneficial a manner as they might otherwise have done, but they certainly did not amount to a complete exclusion of the tenants of the manor from the enjoyment of their rights, and, therefore, I think their proper remedy was to resort to the Courts for the purpose of ascertaining what their rights were and for

(1) 6 T. R. 483, 487.
(2) (1757) 1 Burr. 259.
(3) *Mason* v. *Cæsar* (1675) 2 Mod. 65.

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the enforcement of those rights. I hold therefore that they exceeded their rights and that the action which they took was illegal. It was an act of trespass and an act of such a character that the Courts will deal with it by granting an injunction against the repetition of it and also by giving such damages as may be proper. The question of damages is a difficult one, and, in giving the damages that I propose to give here, I by no means say that I anticipate that I am really compensating the plaintiff for the loss which he has sustained, but that loss I think cannot be properly arrived at unless one knows exactly what the true rights of the parties are. The plaintiff, however, has not come to the Court for the purpose of having those rights defined, but has relied simply on the acts complained of as a trespass which he says in any case entitled him to the protection of the Courts, and he does not ask for an inquiry as to damages. I think he is entitled to relief, and in relation to the damages I will only give such damages as will mark my disapproval of the course taken by the defendants. Against one of the defendants, Beeton by name, no evidence has been tendered, and of course the order I am going to make must not include him; but with regard to the rest of the defendants I grant the injunction claimed restraining them from trespassing or entering on the plaintiff's lands except in the exercise of any rights they may have of cutting furze and ling upon the Great Heath and the Further Heath, and they must pay the costs of the action, and I assess the damages at 5*l*. With regard to the defendant Beeton, against whom no evidence has been tendered, of course any costs that he may have individually incurred must be paid by the plaintiff.

Solicitor for plaintiff: *E. R. Wood, for F. J. Wood, Woodbridge.*

Solicitors for defendants: *Johnson, Weatherall & Sturt, for Marshall & Son, Ipswich.*

H. L. F.

In re HANBURY'S SETTLED ESTATES.

EVE J.
1913
June 19, 25.

[1913 H. 975.]

Settled Estate—Will—Construction—Tenant in Fee with Executory Gift over—Unimpeachable for Waste—Mining Lease—Rents and Royalties—"Contrary Intention" expressed in Settlement—Quality of Estate—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *ss.* 6, 11; *s.* 58, *sub-s.* 1 (*ii.*).

A tenant in fee simple in possession of real estates, with an executory gift over, is not impeachable for waste.

Turner v. *Wright* (1860) 2 D. F. & J. 234, followed.

By his will the testator bequeathed and devised to his wife the whole of his real and personal estate absolutely "in full confidence that she will make such use of it as I should have made myself, and that at her death she will devise it to such one or more of my nieces as she may think fit, and in default of any disposition thereof by her will or testament I hereby direct that all my estate and property acquired by her under this my will shall, at her death, be equally divided among the surviving said nieces."

The House of Lords decided (*Comiskey* v. *Bowring-Hanbury* [1905] A. C. 84) that there was an absolute gift of the testator's real and personal estate to his wife, subject to an executory gift over at her death.

Upon an application by the widow (who had married again) to ascertain whether she was entitled to the whole of the mining rents and royalties in respect of mining leases granted under the powers of the Settled Land Acts:—

Held, that there was in the will a sufficient expression of a "contrary intention" to exclude the operation of s. 11 of the Settled Land Act, 1882, and there was no obligation upon the applicant to set aside as capital any part of the rents, royalties, and profits, under mining leases, pursuant to that section.

The quality of the applicant's estate could not, of itself, be treated as amounting to the expression of a "contrary intention" in the settlement.

ADJOURNED SUMMONS.

By his will dated October 31, 1893, the Right Hon. Robert William Hanbury, of Ilam, in the county of Stafford, gave, bequeathed, and devised to his wife, Ellen Hanbury, the whole of his real and personal estate and property absolutely "in full confidence that she will make such use of it as I should have made myself, and that at her death she will devise it to such one

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or more of my nieces as she may think fit, and in default of any disposition by her thereof by her will or testament I hereby direct that all my estate and property acquired by her under this my will shall, at her death, be equally divided among the surviving said nieces." And the testator appointed his wife and Charles Fisher executrix and executor of his will. The testator died on April 28, 1903, and his will was duly proved by the executrix and executor on July 20, 1903. The real estates possessed by the testator were in the counties of Stafford, Derby, Warwick, and Worcester, and comprised freehold and leasehold collieries. The question of the construction of the devise and bequest in the testator's will was brought before the Courts, and ultimately the House of Lords decided (1) that according to the true construction of the will the testator's real and personal estate was given to his wife absolutely subject to an executory gift of the same at her death to such of the testator's nieces as should survive her, to be equally divided among them if more than one, so far as she should not dispose by will of the estate in favour of such surviving niece or nieces, or any one or more of them.

In 1904 the testator's widow married her present husband, Victor Henry Bowring-Hanbury.

By an order dated May 24, 1909, in the matter of *In re Hanbury's Settled Estates* [1909 H. 967] the Public Trustee and the respondent, Charles Fisher, were appointed trustees of the settlement created by the testator's will of the said estates for the purposes of the Settled Land Acts. There were mines and minerals of considerable value under portions of these estates, especially under those in the county of Stafford. The applicant had recently granted a lease under the powers of the Settled Land Acts, 1882 to 1890, of certain mines and minerals to the Cannock Chase Colliery Company, Limited, and she contemplated the granting of further similar leases. There were seven nieces of the testator who survived him. Six of them were respondents to the summons, and also the trustees of the settlement of the remaining niece, who had settled her contingent estate and interest under the will.

(1) *Comiskey* v. *Bowring-Hanbury* [1905] A. C. 84.

Mrs. Bowring-Hanbury was the person under the will who had the powers of a tenant for life.

An originating summons was taken out on April 17, 1913, by Mrs. Bowring-Hanbury, as the person who under the settlement had the powers of a tenant for life under the Settled Land Acts, asking that it might be determined whether the applicant was and would be entitled to the whole of the rents, royalties, and profits which were or would be payable under any mining lease granted or to be granted by her under the powers of the Settled Land Acts of mines or minerals forming part of the said estates, or whether any, and if so what, part of such rents, royalties, and profits ought to be set aside as capital moneys arising under the said Acts.

P. O. Lawrence, K.C., and *Austen-Cartmell*, for the applicant. The question is whether Mrs. Bowring-Hanbury is entitled to the whole of the rents and royalties of the mines, or whether a portion of the same must be set apart under s. 11 of the Settled Land Act, 1882. She took under the will an estate in fee with an executory limitation over: *Comiskey* v. *Bowring-Hanbury*. (1) The law as to what a person in such a position may do is clear; she is dispunishable for legal but punishable for equitable waste: *Turner* v. *Wright*. (2) Upon the construction of the will she is to reap all profits of the land as owner in fee.

Under s. 58, sub-s. 1 (ii.), a tenant in fee simple with an executory limitation over has the powers of a tenant for life. Under s. 11 a tenant for life has to set aside three quarters of the rent if punishable for waste, and one quarter if not, as capital money. But our contention is that Mrs. Bowring-Hanbury has not to set aside any rents for the benefit of those to come after, first, because a person in her position, i.e., a tenant in fee with executory limitation over, is not within s. 11 at all, and, secondly, because, if she is, there is expressed in this will "a contrary intention" within the meaning of the section. On the general proposition that a tenant in fee is not within s. 11 at all, s. 2, sub-s. 5, defines a tenant for life to be the person who is for the time being beneficially entitled to possession of

(1) [1905] A. C. 84. (2) 2 D. F. & J. 234, 240.

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settled land for his life. Mrs. Hanbury is not "beneficially entitled for life" but is beneficially entitled in fee. There is always "a contrary intention" within the meaning of s. 11 in the case of a person who is by the instrument of settlement made owner in fee simple. A gift of rents and profits has been held to constitute "a contrary intention," and ownership in fee is much more than that, and involves taking the full rents and profits of all leases, mining and other. But, if the general proposition that an owner in fee with executory limitation over is outside s. 11 altogether is not sound, nevertheless the particular language of this will, with the words "in full confidence that she will make such use of it as I should have made myself" superadded to the gift,—meaning that Mrs. Hanbury could make such use of the property as the testator himself could and would have done, which includes making mining leases,—shews "a contrary intention" which takes this case out of s. 11.

R. C. F. Cotton, for trustees for the purposes of the Settled Land Acts.

E. Clayton, K.C., and *F. Whinney*, for other respondents. There are three questions—first, does s. 11 apply? second, is there "a contrary intention"? third, must three quarters or one quarter be set aside?

First, s. 11 applies. Mrs. Hanbury, though not a tenant for life, has the powers of a tenant for life. Having the powers of a tenant for life, the provisions of the Settled Land Acts as to the acts of a tenant for life apply to her. A lease by her apart from the Acts would not take effect after her death as against any niece who should survive her. All the statutory provisions relative to exercise of powers are brought in and apply to Mrs. Hanbury: *In re Daniels.* (1) A gift of rent does not convey power to grant leases of unopened mines. A power which is not given by the will and can only be got by reliance on the Acts must be taken with all the burdens imposed by the Acts. "Rent" is a misnomer in the case of a mining lease. A royalty is not income, but capital paid for the right to work a mine: *In re Aldam's Settled Estate.* (2)

Secondly, as to "a contrary intention"—it is not contended

(1) [1912] 2 Ch. 90. (2) [1902] 2 Ch. 46, 63.

by us that there must be the express words that "section 11 of the Settled Land Act, 1882, shall not apply." If any niece survives, Mrs. Hanbury has only the usufruct and no more during her life. If she has not the absolute property—Kekewich J. thought the word "it" in the sentence "in the full confidence that she will make use of it" might mean income or capital: *In re Hanbury, Hanbury* v. *Fisher*. (1) If, as it is submitted is the case, a tenant in fee with executory limitation over is within s. 11, there is no "contrary intention" expressed in the will. The words "tenant in fee with executory limitation over" must be read, in the section, for "tenant for life," and if the section is thus read, it cannot then be argued that the fact that the gift is to a tenant in fee with an executory limitation over shews "a contrary intention." Sect. 58, sub-s. 1 (ii.), negatives the argument of the other side. In *In re Duke of Newcastle's Estates* (2) there was no need to consider whether or not there was "a contrary intention."

Thirdly, the judgment of Wood V.-C. in the case of *Turner* v. *Wright* (3) relied upon by the other side leaves the question open. Upon the construction of this will the applicant here is impliedly made impeachable for waste. This implication can be made having regard to the limitations over of the capital to be equally divided among the nieces, which indicate that the testator intended the property to go over intact. The applicant therefore takes subject to the obligation of setting aside a suitable amount, which, we submit, is three fourths of the rent of the mining lease, in accordance with s. 11 of the Settled Land Act, 1882.

P. O. Lawrence, K.C., in reply as to whether a contrary intention had been shewn by the testator, referred to the special terms of the will and to *Wright* v. *Atkyns*. (4)

Eve J. Under the will of her late husband the applicant is tenant in fee simple in possession of certain estates in the counties of Stafford, Derby, Warwick, and Worcester, with an executory gift over. She has issued this summons in the matter

(1) [1904] 1 Ch. 415, 418.
(2) (1883) 24 Ch. D. 129.
(3) (1860) Johns. 740.
(4) (1810) 17 Ves. 255; (1815) 19 Ves. 299.

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of these estates, and of the Settled Land Acts, whereby she seeks to have it determined whether she "is and will be entitled to the whole of the rents, royalties, and profits which are or will be payable under any mining lease granted or to be granted by her under the powers of the said Acts of mines or minerals forming part of the said estates, or whether any and if so what part of such rents, royalties, and profits ought to be set aside as capital moneys arising under the said Acts." By the combined effect of paragraph 2, sub-s. 1, of s. 58, and of s. 6 of the Act of 1882, the applicant is empowered to grant mining leases of the settled land for any term not exceeding sixty years. By sub-s. 2 of s. 58 a person in the applicant's position, in exercising this power, is subjected to the same conditions as are imposed by the Act on a tenant for life in exercising it. Among those conditions is that imposed by s. 11, requiring a part of the rent to be set aside as capital money arising under the Act. But the statute does not require this condition to be imposed in all cases. The provisions of the section apply unless a contrary intention is expressed in the settlement; where such contrary intention is expressed, they have no application. It has been argued that the quality of the applicant's estate is of itself the expression of a contrary intention, that the tenancy in fee simple in possession involves a condition of things to which the compulsory capitalization of any part of the rents and profits is contrary and repugnant, and accordingly that the applicant is unaffected by the section. If this argument is sound, it must apply in all cases where the person exercising the statutory power of leasing minerals has an estate similar to that of the applicant, and into sub-s. 2 of s. 58, which provides for the case of a tenant in fee simple with an executory gift over, must be introduced the qualification "other than the provisions of section 11." I do not think any such qualification ought to be introduced into that sub-section, and in my opinion the quality of the estate of the applicant cannot in itself be treated as amounting to the expression of a contrary intention in the settlement. But, apart altogether from these considerations, and assuming that prima facie a person with the applicant's estate is subjected to these conditions, it is argued that there is still in this

settlement a sufficient expression of a contrary intention. I will revert to this contention by-and-by, but before considering it further I think it better to dispose of an argument put forward by the respondents. They argue that if there be no contrary intention expressed in this settlement, and if therefore the conditions of s. 11 apply, this applicant is in the position of a tenant for life impeachable for waste, and that the proportion of the rents to be capitalized is three fourths, and not the one fourth which would be capitalized if she were in the position of a tenant for life unimpeachable for waste. The point which has been argued with great force is this, Is a tenant in fee with an executory gift over impeachable for waste? Speaking for myself I should be content to shelter myself behind the strongly expressed opinion of Lord Campbell and answer the question in the negative.

It is true, as Mr. Clayton said, that the opinion was in one sense a dictum and not a decision, but it was a dictum of no uncertain sound expressed in emphatic terms by the Lord Chancellor after he had dealt with the cases in which a contrary opinion had either been expressed or acted upon. Dealing with such contrary opinion he observed that there were no principles upon which any such doctrine could be applied in the case of an adult tenant in fee simple. If, therefore, this were the simple case of a tenant in fee with an executory limitation over, I should be prepared, following Lord Campbell in *Turner* v. *Wright* (1), to hold that such a tenant is unimpeachable for waste.

But, in my opinion, this is not the simple case of the nature last indicated. I think I have here abundant material for coming to the conclusion, if, as it would seem to be, the intention of the testator is to be regarded, that this testator did not intend the applicant to be impeachable for waste. In the first place, there is the expression of the testator's full confidence that the devisee will use the estate as he would have used it. That means that she will so use, enjoy, and manage the estate as the testator himself would have used, enjoyed, and managed it, felling what is ripe for felling in the case of timber, and working what is

(1) 2 D. F. & J. 234.

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ready for working in the case of minerals. Nor is that all, for under the will the lady has a special power of appointment, and it is only in default of her exercising that power that the executory limitation over takes effect. This I think brings the case very near *Wright* v. *Atkyns* (1), the judgment in which proceeded very largely upon this, that it would have been unreasonable to assume that a testator, who had given the devisee a power of appointment capable of being exercised so as to confer upon an appointee an estate without impeachment for waste, could have intended the donee of the power to be herself restrained from doing that which she was capable of authorizing her appointee to do. If, therefore, the question whether or not this particular tenant is impeachable for waste fell to be determined upon the intention of the testator as evidenced by his will, I should have been prepared to hold that she is not impeachable for waste, although as I have already said, even in the absence of any indication of the testator's intention, I should still have felt bound to follow an opinion emphatically expressed by Lord Campbell over fifty years ago, accepted since by all the text-writers as expressing the law on the point, and never, so far as I can see, doubted or dissented from in any judgment since pronounced.

I have made this digression and expressed my opinion on this point because I think it is material to appreciate the true position of the devisee under this will, in considering the question whether or not there is expressed in the settlement any sufficient intention to exclude the operation of s. 11. I speak with diffidence, but seeing that the statute speaks of "a contrary intention expressed in the settlement," it might perhaps have been more consistent had the section been held to apply in all cases where its application is not excluded in express terms, but that is not the line along which the decisions have proceeded. They have established that in order to ascertain whether the section is applicable or not the whole settlement and all its provisions are to be regarded, and if, on the whole, they lead to the conclusion that the settlor intended that the section should not apply, then there is an intention to exclude it, and this is

(1) 17 Ves. 255; 19 Ves. 299.

equivalent to the expression of "a contrary intention." Many of the cases to which I have been referred shew that little is required in the case of a tenant for life to constitute such a contrary intention and to exclude the operation of the section. For example, the gift to a tenant for life of "all the rents and profits" negatives the intention that any part of them is to be capitalized, a decision which incidentally I may observe disposes of the argument founded on the suggestion that rents and royalties payable for working minerals are not strictly rents and profits, but are rather more in the nature of instalments of purchase-money. So they are from some points of view, but not from that point of view from which this section is to be approached, for the section itself speaks of them as rents and profits. The authorities come, I think, to this, that I must find out what is the position of this lady under the settlement, and then decide whether it is more consistent with an obligation to capitalize a part of the rents, or with no such obligation. As I have already pointed out, the testator contemplated her using and enjoying the estates as he would have done himself, and in so doing and in managing the estates she would be entitled to use her discretion as to what mines should be worked and what mines should be opened, so long as the discretion was exercised conscientiously and with the prudence of an absolute owner judiciously managing his property. The testator, as I read his will, contemplated and intended that she should enjoy all the privileges and advantages of an absolute owner, except only that she was not to have power to dispose of the estates in her lifetime, or at her death, otherwise than by testamentary appointment in favour of his own nieces. Beyond these restrictions and a restriction against committing equitable waste, I cannot find anything to prevent her from enjoying all that the testator could have himself enjoyed, including the whole of the rents of mines and minerals, and I think the expressed intention of the testator that she is to have the same use and enjoyment of the estates as he would have had does amount to the expression of a contrary intention within s. 11. Accordingly, though not without some hesitation, I arrive at the conclusion that the question raised by the summons must be answered by saying

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that there is no obligation upon the applicant to set aside as capital any part of the rents, royalties, and profits therein referred to.

Solicitors: *Patersons, Snow & Co.; Walker, Martineau & Co.*

G. M.

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ESBERGER & SON, LIMITED *v.* CAPITAL AND COUNTIES BANK.

[1912 E. 329.]

Company—Charge to secure Future Advances—Creation of Charge—Charge by Deposit—Registration—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 93.

The date of the creation of a mortgage or charge by a company (within twenty-one days after which registration is required by s. 93 of the Companies (Consolidation) Act, 1908) is the date when the instrument of mortgage or charge is executed and not the date when any money is subsequently advanced on it.

In September, 1910, a company deposited with a bank certain title deeds of landed property, and a sealed but undated memorandum of charge to secure future advances, which were from time to time subsequently made by the bank. On June 14, 1911, the manager of the bank filled in that date, and on July 3, 1911, the memorandum was, for the first time, registered with the Registrar of Joint Stock Companies. The company subsequently went into winding-up:—

Held, that the transaction was void, as a security, against the liquidator and creditors of the company, for want of registration in due time under s. 93 of the Act.

A COMPANY called Esberger & Son, Limited, was the owner in fee of landed property at Ludgate and Chequergate, Louth, in the county of Lincoln.

On September 10, 1910, the company, being in need of an overdraft, deposited the title deeds of the property with its bankers, the Capital and Counties Bank, Limited, with a letter of the same date containing an authority from the chairman of the company to the secretary to deposit the deeds with the bank.

The company on September 17, 1910, sealed, and subsequently delivered to the bank, a memorandum of deposit of the deeds containing a charge to secure the overdraft and an agreement to

execute a mortgage when called upon. This document was not dated, but it was executed in proper form, and a resolution was passed (which was at a later date forwarded to the bank) to the effect that the memorandum of deposit had been signed and sealed.

Then the overdraft was continued, and on or about June 14, 1911, the document was sent back to the company, two directors of which initialled the schedule of deposited documents. The document was then returned to the bank, the manager of which filled in the date of June 14, 1911.

The document was registered with the Registrar of Joint Stock Companies on July 3, 1911.

Further advances were made on the security of the memorandum after June 14, 1911.

In September, 1911, the company went into voluntary winding-up, and on December 16, 1911, an order was made for the continuance of the voluntary winding-up under the supervision of the Court.

In January, 1912, the liquidator demanded delivery up of the deeds. The bank refused to deliver them, and the present action was brought claiming delivery of the deeds to the company on the ground that neither the charge nor the memorandum had been registered in due time under s. 93 of the Companies (Consolidation) Act, 1908.

The bank by its defence alleged "that a document purporting to be a memorandum of charge, with an agreement to execute a mortgage when called upon, was sealed with the seal of the plaintiff company and signed on their behalf on September 17, 1910, and subsequently delivered to the defendants, but that at the time of such delivery the said document bore no date, and was intended to be imperfect, and was delivered to the defendants with the intention that the same should, in case of necessity, be filled up by the defendants, for which purpose they were thereto duly authorized, and should thereupon become and be used by the defendants as a charge affecting the real property to which the said deeds related. It was at the time in the contemplation and intention of the parties that the plaintiff's overdraft would be shortly paid off, and that the security created by the deposit

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of the title deeds would be merely temporary; but it was then verbally agreed between the plaintiffs and the defendants that, if the loan was to be a permanent one, then a more permanent security should be created by means of the perfecting of the said memorandum of deposit. The defendants further say that, the said loan not having been paid off as anticipated, but a more permanent security being required, the said memorandum was subsequently, on June 14, 1911, perfected by the insertion by the defendants or their agent, in pursuance of the said authority in that behalf given to them by the plaintiffs, of the said date of June 14, 1911, and the defendants claim and allege that by such insertion and perfecting of the said memorandum it first became of full effect, and that, by virtue of the same, the defendants became entitled on that date to a specific charge thereby created upon the real estate therein mentioned." And the defendants relied on the registration on July 3, 1911.

The action was tried by Sargant J. on May 23 and 26, 1913.

A. Grant, K.C., and *Owen Thompson*, for the plaintiff company. The first objection to the alleged charge is that the loan which was secured by the document of September 17, 1910, was the same loan as that which was secured by the letter of September 10, 1910, and the deposit of deeds made on that day. That previous charge was void for want of registration under s. 93 of the Companies (Consolidation) Act, 1908; and was not bettered by the same charge for the same money being given over again a few days later.

The second and alternative objection is that if the security of September 10, 1910, was replaced by a fresh security, the latter security was given and was an effective charge on September 17, and was not registered within twenty-one days from that date as required by the section. Where even an agreement to give security is so expressed as to create a present equitable right to a security, it must be registered; and where the security is by deposit of deeds without any instrument registration is necessary, as it is the property charged, and not the instrument, which requires registration: Buckley on Companies, 9th ed. p. 225. The question is not one of intention, but what was the date of the charge.

[SARGANT J. referred to *In re Spiral Globe, Ld.* (*No.* 2) (1)]

That was a case relating to debentures, to which different considerations may apply. If there is a deposit of deeds, and no registration in respect of it, and an agreement to give a legal mortgage, the mortgage is the same security, and registration of that is of no avail.

[SARGANT J. I should have thought that the legal mortgage, if registered within twenty-one days, was valid.]

The charge took effect, at the latest, on September 17, for a deed takes effect from its delivery, not from its date: Sheppard's Touchstone, p. 72; Norton on Deeds, p. 173. The statement of defence does not suggest that the instrument of charge was delivered as an escrow, and the deeds were admittedly placed in the hands of the bank at an earlier date and have remained there ever since. The addition of the date is an immaterial alteration, and the bank clearly had a complete equitable title as mortgagees on September 17 at the latest. The delivery, in order that there should be an escrow, must be of a character negativing its being a delivery to the grantee or to the party who is to have the benefit of the instrument: Norton on Deeds, p. 16.

Romer, K.C., and *Whinney*, for the defendant bank. The memorandum was registered in due time and is a valid security. It was delivered as an escrow and was not a complete deed until June 14, 1911. It is not necessary, in delivering an instrument as an escrow, to say that it is delivered as an escrow: Norton on Deeds, p. 16, citing *Nash* v. *Flyn*. (2) The defence sufficiently pleads delivery as an escrow. Even if a deposit of deeds is not registered, the chargee can subsequently get a fresh security, and if that is registered within twenty-one days it is a valid security.

If a loan is made on the terms that a new security shall be given from time to time fourteen days after the execution of the security lastly given, and the last of the securities is registered within twenty days, that security is valid: *In re Renshaw & Co.* (3)

(1) [1902] 2 Ch. 209. (2) (1844) 1 J. & Lat. 162, 175.
(3) [1908] W. N. 210.

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A mortgage to secure future advances does not create any equitable interest at all, and cannot prevail over advances by other persons made before those future advances are made: *Hopkinson* v. *Rolt.* (1) And a charge is not created within the meaning of s. 93 of the Act of 1908 unless and until some money is advanced under it, and the date of the advance is the date of the creation of the charge, although you may have effectual registration before a charge has been created: *In re Harrogate Estates, Ld.* (2) In *In re N. Defries & Co.* (3) Buckley J. says: "The date at which the money was borrowed may be the date of the creation of the charge, but whether it is or not depends on the circumstances and the bargain between the parties."

Even if the document is invalid as a security for some of the money advanced, one must bear in mind the rule in *Clayton's Case* (4), that the earlier advances have been long since paid off, and that the other advances, or some of them, were made before the expiration of the twenty-one days period allowed for registration. These sums, at any rate, are validly secured.

The document when given was not intended to be an immediate security, but it gave an irrevocable power to fill up the date and so complete it and so create a charge in futuro. The document only came into operation as a security when it was so completed. There were, in fact, two separate transactions. The second was the actual security of June 14, 1911, and that was registered in due time. [They also referred to s. 88, sub-s. 2, of the Stamp Act, 1891 (54 & 55 Vict. c. 39); *In re Cardiff Workmen's Cottage Co.* (5); and *In re New London and Suburban Omnibus Co.* (6)]

A. Grant, K.C., was not called on to reply.

SARGANT J. This appears to me to be a very plain case, but I recognize that it is one of some general importance. The action is brought by a company which is in liquidation, by its liquidator, to have it declared that a certain document of charge given to the defendants, the Capital and Counties Bank, Limited, is void,

(1) (1861) 9 H. L. C. 514.
(2) [1903] 1 Ch. 498, 504.
(3) [1904] 1 Ch. 37, 39.
(4) (1816) 1 Mer. 585.
(5) [1906] 2 Ch. 627.
(6) [1908] 1 Ch. 621.

so far as any security is purported to be created by it on certain land of the company, by reason of its non-compliance with the provisions of s. 93 of the Companies (Consolidation) Act, 1908. Since the institution of the action the land in question has been sold, and the net proceeds of sale, something like 350*l.*, have been substituted for the land. The facts are pretty clear and are such as ordinarily occur in the course of banking business. The company needed an overdraft, which was granted to them by the bank upon the terms of the deeds relating to certain landed property being deposited with the bank, together with a letter of September 10, 1910; and a more formal document of charge was given to the bank on September 17, 1910. That document was executed in proper form by the company, and a resolution of the company was passed, a copy of the minute of which was at a later date forwarded to the bank and was to this effect: "Signed and sealed memorandum of deposit of deeds with the Capital and Counties Bank." The only way in which the document of charge could be said to be at all defective was that it had no date. Then the overdraft continued, and at a later date, namely, about June 14, 1911, or a day or two before that, the document was, upon the request of the bank or from something that was said, taken back or handed to the company, and two directors of the company proceeded to initial or to sign the schedule of documents which had been deposited. Of course that had no effect whatever as regards the validity of the document, but it might be useful to have it signed in case there should be a dispute. The document was returned to the bank and the date was filled in, as June 14, 1911, by the manager of the bank without any further authority than that which had been impliedly given to the bank on September 17, 1910, by handing to them the undated memorandum. The memorandum itself was in the ordinary common form used by the bank.

That being so, it was contended by Mr. Grant that the loan secured by the document of September 17, 1910, was really the same loan as that which had been secured by the letter of September 10, 1910, and the previous deposit of the title deeds, and that as the previous security had not been registered the security was necessarily bad. I should not be prepared to decide

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in favour of that contention without hearing a great deal more argument than I have heard. It seems to me to rather be in conflict with what was said by Buckley J. in the two cases of *In re N. Defries & Co.* (1) and *In re Cardiff Workmen's Cottage Co.* (2), but as the matter does not, in my opinion, turn upon that, I say nothing more upon that point.

The second point which is made against the bank is that the security which was actually executed on September 17, 1910, and subsequently dated June 14, 1911, was itself void by reason of non-registration. The document was registered within the proper period after the date of the creation of the charge if that date was June 14, 1911, but a long time after the expiration of the proper period if the date of creation of the charge was September 17, 1910. Now it seems to me that prima facie that point is a good one, because it is not necessarily an essential part of a deed that there should be a date to it; the date of execution can be proved aliunde. A deed that has been executed and has been delivered to a person in whose favour it is intended to operate is perfectly complete without having any date on it, and therefore the addition of the date was not material to the operation of the deed. In my opinion, from the time when the deed was in fact executed and handed to the bank, namely, September 17, 1910, the bank had a complete and valid operative charge upon the property for the amount purporting to be secured by the deed.

But the argument in favour of the bank for the purpose of rebutting that prima facie result is twofold. In the first place Mr. Romer says that a charge is not created within the meaning of the Companies (Consolidation) Act, s. 93, unless and until there is some money secured by it; that is to say, that if a document is dated on a certain day, and is to secure future advances, and then future advances are not made until a later date, the date of the creation of the charge is the date when the future advances are made and when, therefore, the document becomes an effective document to secure actual money, and is not the date when the actual charge was executed. Now looking at the terms of s. 93, I do not think that that is the true effect of the section. It has

(1) [1904] 1 Ch. 37. (2) [1906] 2 Ch. 627.

been said that the section is one which it is difficult to construe; but where there is in fact an instrument creating or evidencing a mortgage or charge—and that is the only case I need deal with—I feel clear that on the true meaning of that section the date of the creation of the mortgage or charge is the date when that instrument was executed and is not the date when any money is subsequently advanced, so as to make an effective charge for the amount of that money. There is authority for that view of the section in two cases, *In re Spiral Globe, Ld.* (*No.* 2) (1), before Joyce J. and *In re New London and Suburban Omnibus Co.* (2), before Neville J. In the former case the decision of Joyce J. was, perhaps, rather specially with reference to the case of debentures, and therefore I will not further refer to that case, but in *In re New London and Suburban Omnibus Co.* (2) certain general observations were made, and Neville J. said (3): "The construction of s. 14 is not free from difficulty, and one has to consider whether, where there is a conveyance by way of mortgage to trustees for the holders of an issue of debentures, the charge is 'created' upon the execution of the mortgage; or whether it only comes into existence from time to time as the money is advanced by debenture-holders, and debentures are issued which give the holder the benefit of the trust deed." Then the learned judge, after considering the section, came to the conclusion that the relevant date and the important date was the date when the mortgage was executed. That seems to be very much like the case in which a mortgage is executed to secure future advances.

That disposes of the main argument put forward by Mr. Romer; but he has also put forward a subsidiary argument which is hardly distinguishable from his main argument and is to this effect. He says that although this document may be bad as to some part of the advances which are secured, still, as regards any advances which were in fact made within the twenty-one days before the actual registration and remain owing, there, at any rate, there is nothing to avoid the effect of the document. As it happens, if that argument were to prevail, the

(1) [1902] 2 Ch. 209. (2) [1908] 1 Ch. 621.
(3) [1908] 1 Ch. 629.

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bank would get home as to the whole of their effective claim, because on the figures it appears that something like 600*l.* or 700*l.* was advanced by the bank within the twenty-one days of the date of the registration, and the whole amount realized by the property is only, as I have said, something like 340*l.* But I cannot accept that argument. If that were so, it would seem to follow that there was a succession of dates which were the relevant dates. Here you have a document which is executed for the purpose of securing, not only sums which are due at that time, but any sums that may become owing in the future. It would be impossible, I think, to say that the creation of the charge was at one date as regards the sums that were then owing, and at another date as regards sums which became owing in the future. Such a construction would render the working of s. 93 of the Act exceedingly difficult, and, although that ought not to cause me to come to a conclusion which is contrary to the language of the section, I think it is something that may be taken into account in construing that language. The section is providing for the keeping of a register, which is to shew what moneys are owing by the company on certain securities, so that creditors may have some notion of how far the property of the company is unencumbered; and the natural date and the workable date in respect of any one particular instrument must, I think, be the date on which the instrument is executed, and not the series of dates on which various sums of money may from time to time become due. The words in the first part of the section are "mortgage or charge created," and the subsequent words "unless the prescribed particulars of the mortgage or charge, together with the instrument (if any) by which the mortgage or charge is created or evidenced, are delivered to or received by the Registrar of Companies for registration in manner required by this Act within twenty-one days," seem to me to point to one definite period of time from which the twenty-one days must be or can be readily calculated by the registrar.

In my opinion, therefore, there has been a failure to comply with the provisions of the section as regards this mortgage or charge, and the consequence is that, so far as any security is

created by it, it is void as against the liquidator, and the liquidator is entitled to succeed in this action and to have paid to him, accordingly, for distribution the net proceeds of the sale of this land. The plaintiffs must have the costs of the action.

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Solicitors for plaintiffs: *H. G. Campion & Co., for Arthur Neal & Co., Sheffield.*

Solicitors for defendants: *Cameron, Kemm & Co.*

F. E.

BIRCHAL *v.* BIRCH, CRISP & CO.

C. A.
1913
June 20.

[1913 B. 19.]

Practice—Discovery as between Co-defendants—Rights to be adjusted between the Parties—Rules of the Supreme Court, Order XXXI., *rr.* 12, 14.

The plaintiff claimed as assignee of the defendant J. to be entitled to an aliquot part of certain commission which he alleged was due from the defendants B. & Co. to the defendant J. B. & Co. by their defence alleged that the plaintiff had no right at all, inasmuch as they had a claim against J. for damages for misrepresentation which they were entitled to set off against any claim by him for commission. They did not, however, put in any counter-claim:—

Held by Cozens-Hardy M.R. and Kennedy L.J. (Swinfen Eady L.J. dissenting), that B. & Co. were not entitled to an order for discovery against J.

Shaw v. *Smith* (1886) 18 Q. B. D. 193, applied.

Decision of Warrington J. affirmed.

Appeal from an order of Warrington J. refusing to direct the defendant Jackson to give inspection of the documents referred to in his affidavit of documents.

The plaintiff in the action claimed a direction that by virtue of a certain commission note the defendant Jackson and those claiming under him, including the plaintiff and the defendants James Malcolm and Francis Travers Birdwood, were entitled to 137,500*l.* for commission upon the nominal amount of a loan of 10,000,000*l.* to the Chinese Government, and that the sum of 122,051*l.* (being the balance of the said sum of 137,500*l.* after deducting the sum of 15,449*l.* already paid) was now payable by Birch, Crisp & Co. to the defendant Jackson and those claiming under him.

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By his statement of claim the plaintiff alleged that under certain agreements between him and the defendant Jackson and between the defendant Jackson and Birch, Crisp & Co. he was entitled to be paid by the defendants Birch, Crisp & Co. five elevenths of any commission which should become payable to Jackson by the defendants Birch, Crisp & Co. in respect of the issue of a loan of 10,000,000*l.* to the Chinese Government.

It appeared that 5,000,000*l.* of the loan had been issued and that the plaintiff had received 7022*l.*, being five elevenths of the sum of 15,449*l.* which was paid by Birch, Crisp & Co. on account of commission due to Jackson.

The defendants Birch, Crisp & Co. pleaded that when the loan was introduced to them by the defendant Jackson he represented to them that the Chinese Government would on the signing of a certain agreement of August 30, 1912, grant to them a special charter for a State bank for China, and that they had entered into the said agreement on the faith of that representation. They alleged that it was an implied condition of all the agreements entered into by them in connection with the loan that such a charter should be granted to them, and they further said that since the issue of the first half of the loan the Chinese Government had refused to grant the charter. By reason of these facts they asserted that they had a heavy claim for damages against the defendant Jackson, and that if and so far as the plaintiff was the assignee of Jackson he took such assignment subject to the right of Birch, Crisp & Co. to set off against any moneys due from Birch, Crisp & Co. to Jackson all damages properly payable by him to them. There was no counter-claim by Birch, Crisp & Co.

The defendant Jackson having made an affidavit of documents, the defendants Birch, Crisp & Co. took out a summons for inspection of the documents admitted by Jackson to be in his possession. Warrington J. dismissed the summons, and the defendants Birch, Crisp & Co. appealed from his decision.

Romer, K.C., and *P. F. Wheeler*, for the appellants. The appellants are entitled to an order for discovery against their

co-defendant Jackson: *Shaw* v. *Smith.* (1) The real question to be decided is whether there is anything due from the appellants to Jackson. Warrington J. said that there was no issue between them which could be decided in the action, but it is submitted that this is the very case which was contemplated in *Shaw* v. *Smith.* (1)

W. E. Vernon, for the defendant Jackson. The real point in this case is whether there is any issue or question as between Birch, Crisp & Co. and Jackson which can be decided by the Court so as to bind Jackson. I submit there is no such issue or question: *Molloy* v. *Kilby* (2); *Brown & Co.* v. *Watkins & Co.* (3)

[COZENS-HARDY M.R. I am not sure that *Molloy* v. *Kilby* (2) is consistent with *Shaw* v. *Smith.* (1)]

The law is settled by *Shaw* v. *Smith* (1), but the Court will not so apply it as to work an injustice against Jackson, whose position with regard to the charge of misrepresentation made against him by Birch, Crisp & Co. is most unfair.

Romer, K.C., in reply. *Molloy* v. *Kilby* (2) cannot be reconciled with *Shaw* v. *Smith.* (1) The judge cannot decide against the appellants at the trial without determining this question between them and Jackson. The plaintiff stands in no better position than his assignor.

[KENNEDY L.J. The appellants might have counterclaimed against the plaintiff and Jackson and so raised the point.]

It is raised on the pleadings.

[KENNEDY L.J. In *Alcoy and Gandia Ry. and Harbour Co.* v. *Greenhill* (4) the point was raised on a counter-claim. Here there is no plea as between the co-defendants.]

Treating the counter-claim there as an action, that is just this case, and the appellants here are entitled to a similar order for discovery.

COZENS-HARDY M.R. This appeal raises a novel and difficult point. It is novel and difficult because the particular form of action here is by no means a usual one. It is an action in which the plaintiff says "I am entitled to a fraction of a commission which is due to one Jackson from Birch, Crisp & Co.

(1) 18 Q. B. D. 193.
(2) (1880) 15 Ch. D. 163.
(3) (1885) 16 Q. B. D. 125.
(4) (1896) 74 L. T. 345.

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and another co-defendant"—I will speak of them simply as Birch, Crisp & Co. He makes Birch, Crisp & Co. and Jackson defendants, but there are also some other mortgagees and persons claiming charges whom I need not mention.

The question arises upon a commission note or claim for commission in respect of the Chinese loan for 10,000,000*l.* Defences are put in by Birch, Crisp & Co. and by Jackson. Birch, Crisp & Co. say, amongst other things, "We allege and insist that there is no commission at all payable"—that is one point—"You, the plaintiff, have no right at all, but anyhow as against Jackson, our co-defendant, we have a claim for damages for misrepresentation which induced the contract." They put in a defence to that effect, but they do not in any way counterclaim—my present impression is that they could not do so—in the action against the plaintiff and against Jackson. They simply leave it in that way: they put in a defence to the action alleging a very serious case of misrepresentation against the co-defendant. They now claim to be entitled to have inspection of documents which Jackson, their co-defendant, has admitted by his affidavit of documents or otherwise to be in his hands. Speaking generally, it is now quite settled that one defendant cannot get discovery or inspection against another defendant where, to use one of the phrases, and I think perhaps the best, namely, that of Lord Esher M.R. in *Shaw* v. *Smith* (1), "there is no right to be adjusted in the action as between them." The question we have to consider is whether there is in this action any such right to be adjusted between Jackson and Birch, Crisp & Co. Not without hesitation I have come to the conclusion that there is no such right to be adjusted as between those two co-defendants. No doubt it is true in one point of view that the plaintiff, who claims an aliquot part of that which is due to Jackson from Birch, Crisp & Co., may have it said against him, "You must shew not only that something is due from Birch, Crisp & Co. to Jackson, but you must be in a position to shew, and have a right to shew also, what is the amount in pounds, shillings, and pence due from Birch, Crisp & Co. to Jackson, because it is an aliquot part of that amount

(1) 18 Q. B. D. 199.

which you claim." But that does not seem to me to be really the question. I think the more accurate way of testing it is this. Suppose in this action it were held that the plaintiff fails to recover anything on the ground that he has not proved that anything was due from Birch, Crisp & Co. to Jackson. Would that be res judicata in any proceedings which Jackson, as plaintiff, might hereafter take against Birch, Crisp & Co. as defendants? I cannot bring myself to think that it would. I cannot see how it could be so. There is no issue directed between the parties, no relief is asked, or, apart from counterclaim, could be asked, in this action by Birch, Crisp & Co. against Jackson or by Jackson against Birch, Crisp & Co. That being so, it seems to me that, although in a certain sense the relations between Birch, Crisp & Co. and Jackson must be investigated in this action, it is not an action in which the rights between those parties have to be adjusted.

One of the substantial points raised by Birch, Crisp & Co. in this action is the alleged misrepresentation by Jackson. Damages for misrepresentation cannot be set off against another chose in action in circumstances like these. It therefore is simply a case in which it is sought indirectly to try an action based upon misrepresentation—it may be fraudulent misrepresentation—in proceedings which are not served, so far as the claim for damages for misrepresentation is concerned, upon Jackson, the party said to be guilty of it. I think it would be exceedingly unfair and unreasonable to treat an action of this kind for the purpose of this rule as one in which discovery ought to be ordered when the exceedingly important issue of misrepresentation is one in respect of which no relief, as between the party who made the misrepresentation and the party to whom it has been made, can be given in this action. In my opinion the learned judge took the right view that this is not (within the principles as settled by this Court in *Shaw* v. *Smith* (1)) an action in which there is any such right to be adjusted between Birch, Crisp & Co. and Jackson particularly in respect of this misrepresentation.

KENNEDY L.J. I am of the same opinion. Of course these cases may run very close, but we are bound by the view

(1) 18 Q. B. D. 193.

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that was expressed by this Court in *Shaw* v. *Smith* (1), and by that rule I think this case must be judged. In that case, looking particularly at the class of action such as this is in the Chancery Division, Lord Esher M.R. (2) in terms said "It may often be necessary to adjust rights in the action between two plaintiffs or two defendants." Now it is said here that this is a case in which rights have to be adjusted in the action between these co-defendants. The defendants, who are appealing, say "We have set out in paragraph 10 and paragraph 11 that we have been led into making an agreement which may affect the rights of the parties by the misrepresentation of the co-defendant," and they proceed to say that they have a heavy claim for damages against that co-defendant, and "so far as the plaintiff is the assignee of any moneys due to the co-defendant from these defendants the plaintiff took such assignment subject to the rights of the defendants to set off against such moneys all damages properly payable to them." So far as the facts appear, I should say that the expression "set-off" is wholly inappropriate. It is damages for misrepresentation. It is new to me at any rate that damages for misrepresentation can possibly be treated as a set-off where, as here, it is simply so pleaded. If these defendants had wished to avail themselves of such rights as to inspection and discovery as under the decision in *Shaw* v. *Smith* (1) would be theirs, they could, I think, if they had chosen so to do, have made this matter a matter to which the expression that it was necessary to adjust the rights in the action between themselves and Jackson would be applicable. They might have counterclaimed against the plaintiff and Jackson because as they allege they are setting up this defence as a defence against the plaintiff so far as he is assignee of Jackson—and Jackson, their co-defendant, would properly have been made a defendant to that counter-claim because the agreement is an agreement with him, the invalidity of which they are seeking to assert as against the plaintiff. Then the judge at the trial in dealing with that counter-claim would have had to deal with the rights between the plaintiff, these defendants, and their co-defendant. But for reasons which I daresay exist, they are careful not

(1) 18 Q. B. D. 193. (2) 18 Q. B. D. 197.

to ask for a rescission or cancellation of the agreement because a material fact upon the faith of which it was entered into by them was misrepresented or concealed, but they say "We are not seeking to set aside the agreement: we are seeking to get damages against Jackson"—and those damages they claim to set off against the plaintiff. They make no claim against Jackson at all; and there is no issue between them on the pleadings. I read the words "to adjust the rights in the action" to mean rights as to which when the case is tried there will be a judicial decision as between these parties. It may be that on the pleadings as they stand the judge will have to come to a conclusion in regard to the validity of the agreement, but I am not at all sure that he will, because, as I say, they are not seeking to set aside this agreement on the ground of misrepresentation at all. If it comes into issue at all, it comes into issue as between themselves and the plaintiff and not as between them and their co-defendant. Their co-defendant has not raised any case against them and they are not seeking any relief against him in this action. The judge will have no duty to pronounce a judgment or make a declaration, as I understand the position of the case, adjusting rights as between the two. The decision will be between the appellants and the plaintiff, and I do not see that that is adjusting rights between the co-defendants in the action, although, as the Master of the Rolls has said, it may be material, and perhaps very material, to consider the truth or untruth of the relations as they are asserted by the defendants to have existed between themselves and Jackson.

I think Warrington J. was right in saying that in a case of this kind there is no issue or question which the judge to do complete justice must judicially pronounce upon so as to adjust any rights between these parties.

SWINFEN EADY L.J. I have the misfortune to take a different view. The law was settled I think by the case of *Shaw* v. *Smith* (1) which has been referred to. It was there determined that there are cases where one defendant may have a right to discovery or inspection as against another defendant, namely, where there are

(1) 18 Q. B. D. 193, 200.

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rights to be adjusted between them. Lindley L.J. used the same phrase as Lord Esher, but he added, "apart from any community of interest or any question of rights to be adjusted between the parties." Lopes L.J. took the same view.

Now it does not depend upon whether every question raised by the pleadings can be finally determined in the action, but whether there are rights to be adjusted between the parties; and if there are rights to be adjusted between co-defendants, then, in my opinion, the right to discovery is afforded, because it would be unfair to give relief or finally to determine the position of one defendant as against another without affording him the benefit of discovery. In the present case the plaintiff claims as an assignee of a chose in action—he claims as the assignee of a share of commission—and he claims an aliquot part. He claims five elevenths of certain commission payable by the defendants Birch, Crisp & Co. to the defendant Jackson, and in the claim he alleges that commission is payable by Birch, Crisp & Co. to Jackson, five elevenths of which he, the plaintiff, is entitled to. The defendants Birch, Crisp & Co. deny that commission is payable by them to Jackson. As regards part of the claim it is commission in respect of a loan of 10,000,000*l.*, and as regards half of that loan, 5,000,000*l.*, it is alleged that the transaction was afterwards cancelled, the loan never went through, and no commission in respect of that portion of the loan ever became payable. Birch, Crisp & Co. dispute that they are liable to pay the commission to Jackson in respect of which the plaintiff claims his share.

The plaintiff by his pleading claims a declaration that the defendants Birch, Crisp & Co. are liable to pay, and that Jackson and the persons claiming through him are entitled to a definite sum which is mentioned, being the commission at the rate agreed upon on the entire loan. He asks to have a declaration that Jackson and the persons claiming through him are entitled to that sum, 137,500*l.*, as commission, and that 122,051*l.*, part of it, is now payable by Birch, Crisp & Co. to Jackson and those claiming under him,—that is to say he claims a declaration that one defendant is bound to pay to the other defendant a certain sum of money—and that issue is one of the

issues which will have to be determined in the action. It is necessary for him to establish that issue, because his next step is that he claims payment of five elevenths of the sum. He has first to establish that the defendants Birch, Crisp & Co. are liable to pay the defendant Jackson a sum, so that he may then establish his next point—"Five elevenths of that must now be paid to me by virtue of Jackson's assignment to me."

Now, Birch, Crisp & Co. deny liability to pay the commission, and they also raise a further point with regard to damages, but I do not propose to refer to that.

If the plaintiff wholly fails in the action it may be said that no question has been finally determined between the co-defendants—that it has not been determined that Jackson is not entitled to recover commission against Birch, Crisp & Co. I agree with what the Master of the Rolls has said, that there would be no res judicata between the co-defendants in that event. Indeed the plaintiff might fail to prove any assignment to himself. But on the other hand, suppose the plaintiff succeeds. In order for the plaintiff to succeed it must be determined, and, as it appears to me, finally determined, that is to say there must be a definite judicial decision on the point, that Birch, Crisp & Co. owe a sum to Jackson and that the plaintiff is entitled to a certain share of what is owing to Jackson. On that adjudication the plaintiff would be entitled to recover against Birch, Crisp & Co. and issue execution against Birch, Crisp & Co. as on a final judgment. In that event it would be finally determined as between Birch, Crisp & Co. and Jackson that Birch, Crisp & Co. owed that money to Jackson; in certain events there is a final adjudication and final adjustment of the rights between the parties. Every issue between Birch, Crisp & Co. and Jackson necessary to determine whether Birch, Crisp & Co. are indebted to Jackson, and, if so, for what amount, must be decided before the amount can be ascertained for which the plaintiff is entitled to final judgment. Under these circumstances there are questions of adjusting the rights as between Birch, Crisp & Co. and Jackson which arise in the action and in respect of which there should be discovery. There are further questions

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which have not been fully argued, but it will be observed that the plaintiff is not the only assign claiming from Jackson —there are other co-defendants and there is a question of priority inter se—and those questions must be decided in order that it may ultimately be determined whom Birch, Crisp & Co. are to pay: because, if Jackson is entitled to commission, there is still a question which of the assigns claiming through Jackson—the plaintiff or the other co-defendants—is entitled to receive the money from Birch, Crisp & Co. In my opinion the present case falls within the language used in *Shaw* v. *Smith*. (1) There are rights to be adjusted between Birch, Crisp & Co. and Jackson in respect of which Birch, Crisp & Co. ought to obtain discovery against Jackson before proceeding to the trial.

Solicitors: *Roney & Co.; Holman, Birdwood & Co.*

G. A. S.

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[1913 H. 126.]

Probate—Revocation—Supposed Intestacy—Grant of Letters of Administration —Sale of Real Estate by Administratrix—Subsequent Discovery of Will appointing Executors—Invalidity of Purchaser's Title—Court of Probate Act, 1857 (20 *&* 21 *Vict. c.* 77), *ss.* 75, 77, 78—*Land Transfer Act*, 1897 (60 *&* 61 *Vict. c.* 65), *ss.* 1, 2, 24.

A grant of administration bona fide obtained in ignorance of a will appointing executors is void ab initio, and any sale of real estate by the supposed administratrix is also void, though, if the sale is made for payment of debts or duties which the executors would have been compellable to pay, the purchaser may possibly have a right or lien by subrogation to the amount (if any) of his purchase-money actually so applied.

Graysbrook v. *Fox* (1565) 1 Plowd. 275; *Abram* v. *Cunningham* (1677) 2 Lev. 182; *Boxall* v. *Boxall* (1884) 27 Ch. D. 220; and *Ellis* v. *Ellis* [1905] 1 Ch. 613, applied.

Debendra Nath Dutt v. *Administrator-General of Bengal* (1908) L. R. 35 Ind. Ap. 109, and *Craster* v. *Thomas* [1909] 2 Ch. 348, distinguished.

Dicta in *Doyle* v. *Blake* (1804) 2 Sch. & Lef. 231, 237, and *Errington* v. *Rorke* (1857) 6 Ir. C. L. Rep. 279, 316, disapproved.

WITNESS ACTION.

On January 30, 1899, George Francis Hewson, the owner in

(1) 18 Q. B. D. 193.

fee simple of the Ovington Glebe Estate, Southampton, died without issue.

On June 13, 1899, after a diligent but unsuccessful search had been made for a will, general letters of administration were granted to his widow, who applied therefor under a genuine belief that her husband had died intestate.

On May 31, 1900, the estate (less four acres purchased by the administratrix) was offered for sale by auction "by order of the administratrix" subject to certain particulars and conditions of sale.

The property was not sold at the auction, but by a contract dated August 23, 1902, embodying the same particulars and conditions of sale, the administratrix agreed to sell the property to the defendant Shelley for 3500*l.*

By a conveyance dated October 13, 1902, and made between the administratrix of the one part and the purchaser of the other part, the administratrix "as personal representative of the said George Francis Hewson deceased by virtue of the powers conferred on her by the Land Transfer Act 1897 and of every other power in this behalf her enabling and also in her individual capacity as to all estates or interests therein (if any) so vested in her" conveyed the estate to the purchaser in fee simple, and the purchaser took possession on the same day.

The administratrix died on September 2, 1911, having by her will dated November 22, 1910, appointed Davis her executor.

On November 11, 1911, in going through her papers her executor found a holograph will of G. F. Hewson which had slipped down between the back and shelves of certain pigeon holes in a desk or bureau in which G. F. Hewson had apparently placed it.

By this will, dated April 24, 1894, the testator G. F. Hewson bequeathed the Ovington Glebe Estate in trust for his wife for life and after her death to the plaintiff George Hewson on certain conditions therein mentioned. He appointed the plaintiffs, his wife, and another person, who renounced, his executors.

On February 9, 1912, the letters of administration were revoked and probate was granted to the plaintiffs.

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On January 14, 1913, the plaintiffs as executors brought this action against the purchaser, his mortgagees, and the tenant of the property for possession and an account of the rents and profits since the widow's death. It was subsequently arranged that the tenant's name should be struck out as a defendant.

The defendants relied on the sale by the de facto administratrix, which they were entitled and indeed bound to assume was made in due course of administration and which they said was in fact so made.

The following additional facts relating to the actual administration of the estate were proved at the trial.

The statutory next of kin of G. F. Hewson were his widow, two nephews, and four nieces, three of the nieces being his co-heiresses.

On June 16, 1899, the solicitors of the administratrix wrote on her behalf to each of the three co-heiresses stating that at the time of G. F. Hewson's death it was confidently believed that he had made a will. They stated that it was known that at one time such a will was in existence and on his death-bed G. F. Hewson informed his wife that he had left everything to her. Every effort, however, to find any will had so far failed, and though it was possible that it might at some future time be found, the presumption at present was that G. F. Hewson must have destroyed his former will with the intention of making a new one, but that this intention was never carried into effect. In these circumstances and acting on this presumption the widow had taken out administration and was now about to administer unless prior to the actual division a will came to light. They then pointed out that the real estate would devolve on the co-heiresses subject to the widow's dower and informed them that it was of the poorest description and untenanted and was being farmed by a bailiff at a considerable loss, and that it was therefore imperative that it should be sold with as little delay as possible, and asking them to sign an enclosed authority for its sale, which was desirable if any advantage was to be derived from it.

The defendants objected that this letter was not evidence against them, but the objection was overruled.

It was also proved that prior to March, 1900, the estate duty, 188*l.*, on the realty was paid mainly out of the proceeds of sale of the four acres, and a small balance, about 15*l.*, out of the shares of personalty to which the widow and co-heiresses were entitled, and that the debts and funeral expenses, which were trifling, had been discharged. The succession duty was also paid out of the shares of personalty.

On March 1, 1900, the real estate still remained subject to six half-yearly instalments of a land improvement charge against which G. F. Hewson had covenanted to indemnify his vendor. The total instalments amounted to 23*l.* 13*s.* 1*d.* These instalments were regularly paid by the administratrix in March and September.

On May 31, 1900, the date of the abortive auction, the liability was only 19*l.* 14*s.* 3*d.*

On August 23, 1902, the date of the contract, there was only one instalment left, namely, 3*l.* 19*s.*, which was paid by the administratrix on September 24, 1902, before completion, and on completion on October 13, 1902, the administratrix became entitled to a return of 40*l.* estate duty and 19*l.* succession duty overpaid on the real estate. The administratrix had, however, incurred a liability of 69*l.* 10*s.* to the auctioneers and solicitors for the abortive auction and certain solicitors' charges, about 45*l.*, for subsequent attempts to sell the property and in connection with the final winding up of the estate, and which were quite independent of the scale fee on the actual purchase.

One-third of the net proceeds of sale was invested in 1394*l.* 11*s.* 8*d.* Consols to provide dower for the widow's life, and the residue was divided among the co-heiresses. The widow's dower fund was still intact and stood in the name of Davis, her executor, a member of the firm of solicitors acting for the plaintiffs and formerly acting for the widow. The plaintiffs were willing to hand over this fund in exchange for the title deeds.

Hon. Frank Russell, K.C., and *Arnold Herbert*, for the plaintiffs. At the testator's death his real estate vested like a chattel real in all his executors quite independently of their proving or acting:

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Land Transfer Act, 1897, ss. 1, 2, 24; *In re Pawley and London and Provincial Bank* (1); Brickdale and Sheldon's Land Transfer Acts, 2nd ed. pp. 256—258. For the purpose of administration the Act puts real estate in the position of a chattel real with one exception, namely, that whereas one executor or administrator could convey a chattel real, all the executors or administrators, as the case may be, must join in conveying real estate. This exception is now modified by the Conveyancing Act, 1911 (1 & 2 Geo. 5, c. 37), s. 12, which enables dispositions of real estate after January 1, 1912, to be made by the proving executors. This section is obviously inapplicable to the present case, as the administratrix did not prove the will, and the sale was in 1902. The administratrix could not therefore make a title as executrix.

The only question, therefore, is whether she could make a title as administratrix. Now there is nothing in the Land Transfer Act, 1897, to divest the executors' title, and the point really turns on the question whether under the previous law she could have effectually conveyed a chattel real under her letters of administration. The answer to this question is in the negative. As the will appointed executors in whom the property vested at the testator's death, the grant of administration and any sale thereunder were void ab initio: *Graysbrook* v. *Fox* (2); *Abram* v. *Cunningham* (3); *Boxall* v. *Boxall* (4); *Ellis* v. *Ellis*. (5)

The supposed exception of "acts done in a due course of administration" which has crept into the head-note of *Ellis* v. *Ellis* (5) is merely based on a dictum of Walsh J. in *Graysbrook* v. *Fox* (6) and must be limited to acts that the executors would have been compellable to do, e.g., payment of funeral expenses, debts, or duties, the ground of the exception being that these are acts by which the executors suffer no disadvantage and are merely freed from the trouble of doing them themselves. The exception is evidently based on subrogation and would at most

(1) [1900] 1 Ch. 58.
(2) 1 Plowd. 275.
(3) 2 Lev. 182; 1 Vent. 303; Freem. K. B. 445; 2 Mod. 146; 3 Keb. 725; T. Jo. 72.
(4) 27 Ch. D. 220.
(5) [1905] 1 Ch. 613, 617.
(6) 1 Plowd. 282.

give the purchaser a lien for so much of the purchase-money as was actually applied in payment of debts or duties. In this case none of it was so applied.

In *Craster* v. *Thomas* (1) and *Debendra Nath Dutt* v. *Administrator-General of Bengal* (2) the English executors were not as such executors in India, so that the Indian administration was not void ab initio. The law on the point is summed up in Halsbury's Laws of England, vol. xiv., p. 216.

Micklem, K.C., and *Wilfrid Hunt*, for the purchaser. The so-called dictum of Walsh J. in *Graysbrook* v. *Fox* (3) was concurred in by all the judges and is good law. There is nothing to confine it to the principle of subrogation. The ground of the exception, namely, that "he that has the right suffers no disadvantage," refers to the executor, not the beneficiary. Apart from fraud a sale in due course of administration is good: Williams on Executors, 10th ed. pp. 195, 462.

In *Abram* v. *Cunningham* (4) a son entitled to leaseholds as executor of his father's will which he had proved died on September 15, 1665. On February 14, 1665-6, administration de bonis non of the father's estate was granted to Bradborne. The son's will appointing executors was afterwards discovered but not proved, and on October 21, 1671, his surviving executor, who was of course his father's executor by transmission, renounced probate. On March 1, 1672, Bradborne assigned the term to Lovelace, the plaintiff's lessor, for 1000*l*. On February 11, 1673, Bradborne was cited to repeal his administration de bonis non, and on February 13, 1673, his administration de bonis non was repealed and committed to the defendant, who entered, whereupon the plaintiff brought ejectment.

Saunders for the plaintiff admitted that if the son's executor had proved his will, Bradborne's administration de bonis non and all mesne acts would have been void, but he contended that the executor's subsequent renunciation made the administration good ab initio, and that consequently the sale of the term made after the

(1) [1909] 2 Ch. 348.
(2) L. R. 35 Ind. Ap. 109.
(3) 1 Plowd. 275, 282.
(4) 2 Lev. 182 (note that the report dates the administration according to the old reckoning of the year from March 25).

ASTBURY J. renunciation was good although the administration was afterwards repealed upon citation.

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There was no plea that the sale had been made in due course of administration, so that the admission as to the invalidity of the administrator's mesne acts as well as that of the grant may have been right on the facts. But in any case the admission was made, and the only question the Court had to decide was whether the admitted flaw in the title was cured by the executor's subsequent renunciation. The case is only an authority on the latter point, which was decided in the negative.

In *Boxall* v. *Boxall* (1) Ribton made the same admission as Saunders, but distinguished his own case on the ground that the will contained no appointment of executors. Kay J. accepted the distinction. The question whether the supposed decision in *Abram* v. *Cunningham* (2) was right was not before him, and his judgment in no way turned on that point.

In *Ellis* v. *Ellis* (3) the facts were apparently as follows. On August 21, 1892, a mortgagor who had deposited the lease of a house by way of equitable mortgage for 100*l.* died, having made a will appointing an executor and bequeathing the house to a beneficiary. The mortgagee thereupon demanded the debt from the mortgagor's son George on threat of foreclosure. On October 20, 1892, the son borrowed the amount from his uncle, paid off the mortgagee with 3*l.* interest in exchange for the lease, and then handed a promissory note and the lease by way of security to his uncle. On November 9, 1892, the son took out letters of administration without mentioning the will, of which he was aware. On November 23, 1892, a revocation action was commenced, and in June, 1893, the administration was revoked and probate granted to the mortgagor's executor. In July, 1902, the beneficiary of the house sold it to a purchaser, who was informed that the lease was lost. In August, 1903, the uncle died, and on October 19, 1904, his executors brought an action for foreclosure against the purchaser. The purchaser denied that the plaintiffs were mortgagees and relied on the Statutes of Limitation.

(1) 27 Ch. D. 220. (2) 2 Lev. 182.
(3) [1905] 1 Ch. 613.

Warrington J. erroneously treated *Abram* v. *Cunningham* (1) as a decision that the administration was void ab initio and the exception in *Graysbrook* v. *Fox* (2) as a mere dictum of Walsh J. and in any case not applicable, as, although the payment of the debt might be treated as proper, the mortgage by the administrator was essentially a voluntary act. His attention was not, however, called to any authorities contrary to the "void ab initio" doctrine supposed to be established by *Graysbrook* v. *Fox* (2) and *Abram* v. *Cunningham* (1) or to the Court of Probate Act, 1857, ss. 75, 77, 78, by which that doctrine if it ever existed has been nullified, and as he held that the son's mortgage was a voluntary act his observations on the exception in *Graysbrook* v. *Fox* (2) were only obiter.

Now at the time of these old cases an administrator appointed by the Ecclesiastical Court and an executor appointed by the will might both be acting at the same time, and it was necessary to protect the executor from being liable for the administrator's acts. For this purpose the Courts used to hold the administration void ab initio against the executor, except for acts in due course of administration. It was not void in any other sense: *Doyle* v. *Blake*. (3) Under the modern law—Court of Probate Act, 1857, s. 75—an executor cannot act until the administration is recalled or revoked, so that this protection is no longer necessary.

It is clear that probates or administrations granted by the Court were not in fact treated as wholly void. In *Allen* v. *Dundas* (4) payment to an executor who obtained probate of a forged will was held a good discharge to the debtor on the ground that he was protected by the act of a Court with competent authority, although the probate was afterwards revoked and administration granted. Again in *Prosser* v. *Wagner* (5) payment to an administrator was held a good discharge although a will appointing an executrix was known to be in existence. See also *Stephens* v. *Langley*. (6)

The true representative may even be bound by the lawful

(1) 2 Lev. 182.
(2) 1 Plowd. 275.
(3) 2 Sch. & Lef. 231, 237.
(4) (1789) 3 T. R. 125, 129.
(5) (1856) 1 C. B. (N.S.) 289.
(6) (1673) Finch, 40.

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acts of an executor de son tort: *Coulter's Case* (1); *Mountford* v. *Gibson* (2); Williams on Executors, 10th ed. p. 195; and a fortiori he must be bound by the lawful acts of an administrator.

At the husband's death, in the present case, no will could be found, and the widow was obviously the proper person to administer. As soon as she intermeddled it became her statutory duty to take out administration: Stamp Act, 1815 (55 Geo. 3, c. 184), s. 37. In pursuance of this duty she applied to the Court on the footing that her husband died intestate, and administration of all the estate which by law devolved to and vested in the personal representative of the said intestate was granted to her in common form. She also entered into the common form bond providing (inter alia) for delivery up of the letters of administration if a will should appear and be exhibited by the executors: Williams on Executors, 8th ed. p. 539, 10th ed. p. 420; Tristram and Coote's Probate Practice, 14th ed. p. 912. It is clear from this common form bond, which dates from 1671, that the possibility of the existence of a will appointing executors has always been contemplated by the Court which grants administration, and it is inconceivable that the grant can become void ab initio if the contingency occurs.

Sometimes the existence of a will is known, but it cannot be found. In such a case the Court does not grant full administration. It grants administration until the will is found—*In the Goods of Campbell* (3)—and it may further limit the administrator's powers. For instance in *In the Goods of Wright* (4) the administrator's powers were limited to dealing with specific leaseholds. It is obviously assumed that without some such limitation he might deal with the whole estate. A grant "till the executor comes in" is mentioned in Gibson's Codex, 1713, p. 574. See also Tristram and Coote's Probate Practice, 14th ed. p. 98.

The effect of the Court of Probate Act, 1857, must now be considered. Sect. 75 prevents an executor acting until the administration is revoked. Sect. 77 validates bona fide payments to or by an administrator before revocation, and s. 78 indemnifies

(1) (1598) 5 Rep. 30b.
(2) (1804) 4 East, 441.
(3) (1829) 2 Hagg. Eccl. 555.
(4) [1893] P. 21.

and protects all persons making any payment or transfer bona fide upon any letters of administration notwithstanding any defect or circumstance whatsoever affecting their validity. The administratrix was therefore protected in transferring the property, and the purchaser obtained a good receipt for his purchase-money. This was equivalent to a receipt by the executors, and even if the legal estate did not pass they must give credit for the purchase-money. There is no question of mala fides here. The purchaser was bound to assume that the grant of administration was valid and that the sale was made in due course of administration: *Allen* v. *Dundas* (1); *Prosser* v. *Wagner* (2); *Oceanic Steam Navigation Co.* v. *Sutherberry* (3); *Solomon* v. *Attenborough.* (4)

Up to this point our argument has been virtually confined to an administrator's powers over personalty and chattels real. But since the Land Transfer Act, 1897, he has practically the same powers over real estate. Sect. 1, sub-s. 1, provides that notwithstanding any testamentary disposition real estate shall vest in the personal representatives from time to time as if it were a chattel real, and s. 2, sub-s. 2, provides that all enactments and rules of law relating to the effect of letters of administration as respects chattels real and the powers of personal representatives in respect of personal estate shall apply to real estate as if it were a chattel real, with an immaterial exception. Sect. 24 defines personal representative as meaning an executor or administrator.

Now until probate or administration no personal representative exists and the real estate remains in the heir—*John* v. *John* (5)—so that ss. 1 and 24 must really mean that the real estate vests in the personal representatives, whether executors or administrators, from time to time clothed by the Court with that character. Upon probate or administration the title of the personal representative relates back to the death: *In the Goods of Pryse.* (6) In *In re Pawley and London and Provincial Bank* (7) the will was proved by two executors, so that probate enured for the benefit of all and they were all personal representatives. In *In re Parker's Trusts* (8)

(1) 3 T. R. 125.
(2) 1 C. B. (N.S.) 289.
(3) (1880) 16 Ch. D. 236, 244.
(4) [1912] 1 Ch. 451, 455.
(5) [1898] 2 Ch. 573, 576.
(6) [1904] P. 301.
(7) [1900] 1 Ch. 58.
(8) [1894] 1 Ch. 707, 721, 722.

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Kekewich J. held that under the similar section of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 30, trust estates vested in the proving executors only. In that case the non-proving executors were "special executors," so that possibly the general probate did not enure for their benefit. It appears indeed that the usual power to prove was not reserved to them. The case, however, shews that executors are not personal representatives until one of them has proved.

In none of these cases was there any prior grant of administration, so that the present point did not arise. In the present case there was such a grant and the executors' powers were wholly suspended while it existed: Court of Probate Act, 1857, s. 75. Even assuming that the bare legal estate was vested in the executors, the administration of the entire property was in the hands of the administratrix. She was the only person who could deal with it, and on her sale the executors became trustees for the purchaser: *Craster* v. *Thomas*. (1)

It is suggested that the sale was not made for payment of debts or duties. This does not concern the purchaser, who had no right to inquire. He had, of course, no notice of the letter to the co-heiresses. There was, however, in fact a liability of 19*l*. 14*s*. 3*d*. to justify the abortive auction and other attempts to sell the property, and at the date of the contract the liability had been substantially increased by these unsuccessful attempts. The administratrix had also paid about 4*l*. estate duty out of her share of personalty under s. 6, sub-s. 2, and s. 8, sub-s. 4, of the Finance Act, 1894 (57 & 58 Vict. c. 30), and was therefore entitled to raise that amount by sale or mortgage under s. 9, sub-s. 5, whether the property was vested in her or not. She could not have got a return of the overpaid duty before she had proved the over-valuation by an actual sale.

Hewitt, K.C., and *H. S. Preston*, for the mortgagees. A purchaser is bound by a probate or administration—*Marriot* v. *Marriot* (2); *Allen* v. *Dundas* (3)—and need not inquire as to debts: *Ewer* v. *Corbet* (4); *Burting* v. *Stonard*. (5) The fact

(1) [1909] 2 Ch. 348, 360.
(2) (1725) Gilb. Eq. Rep. 203, 207; 1 Str. 666, 671.
(3) 3 T. R. 125.
(4) (1723) 2 P. Wms. 148.
(5) (1723) 2 P. Wms. 150.

that a subsequent will is discovered does not invalidate his title: *Errington* v. *Rorke*. (1)

The case of fraud or wilful suppression of a will is an exception. In *Ellis* v. *Ellis* (2) there was wilful suppression. In *Woolley* v. *Clark* (3) an executor who had proved a will and an auctioneer instructed by him sold goods after they knew of a subsequent will appointing an executrix. They were held liable in trover at the suit of the executrix on the ground that they had notice of the second will before the sale. It is tacitly implied that apart from such notice the executor's mesne acts would have been good. Subject to these observations we adopt the purchaser's argument.

Hon. Frank Russell, K.C., in reply. The admission of Saunders in *Abram* v. *Cunningham* (4) was made on the authority of *Graysbrook* v. *Fox* (5) and was obviously treated by the Court as correct. These decisions were recognized in *Boxall* v. *Boxall* (6) and followed in *Ellis* v. *Ellis*. (7)

In *Ellis* v. *Ellis* (7) Warrington J. no doubt treated the mortgage by the administrator as a voluntary act, but he also held that the plaintiffs' claim as transferees by subrogation of the original mortgage was barred, on the ground that the payment of interest, though made by the son who afterwards took out administration, was in reality a payment by a stranger. This part of the decision can only be justified on the ground that the administration was void ab initio, and the case is therefore a direct decision on that point.

Lord Redesdale's dicta during the argument in *Doyle* v. *Blake* (8) are of so little weight that the Revised Reports have discreetly omitted them, and the dictum of Richards B. in *Errington* v. *Rorke* (1) merely shews that even an Irish judge may momentarily forget cases in Plowden and Levinz.

Sects. 77 and 78 of the Court of Probate Act, 1857, do not enable an administratrix whose administration is void ab initio to convey property that is not vested in her or to give a good receipt for the purchase-money.

(1) 6 Ir. C. L. Rep. 279, 316.
(2) [1905] 1 Ch. 613.
(3) (1822) 5 B. & Al. 744.
(4) 2 Lev. 182.
(5) 1 Plowd. 275.
(6) 27 Ch. D. 220.
(7) [1905] 1 Ch. 619.
(8) 2 Sch. & Lef. 231, 237; 9 R. R. 76, 81.

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I admit that if an administrator de jure sells the purchaser need not inquire as to debts or duties, but that does not touch the question of the administrator's own title, and even in that case the purchaser has to take the risk that the administration is over: *Attenborough* v. *Solomon*. (1) In the present case the sale was obviously not made for the payment of the small land improvement charge or the 4*l*. estate duty advanced by the administratrix out of her share of personalty. It was simply made for purposes of division. The other liabilities were merely incurred by the administratrix in respect of this particular property and were not liabilities of the general estate at all.

In *John* v. *John* (2) the point as to the construction of the Land Transfer Act, 1897, was not argued. The supposed analogy of the Conveyancing Act, 1881, s. 30, is wholly fallacious as that Act does not define the term "personal representative." *In re Parker's Trusts* (3) is therefore no authority on the construction of the Land Transfer Act, 1897, in which the term "personal representative" is defined as "executor or administrator."

Cur. adv. vult.

July 17. ASTBURY J., after stating the facts and deciding a small subsidiary point as to parcels, continued: The main question in this action is whether the plaintiffs, as the executors of the testator, are now entitled to the real estate purported to be conveyed to the defendant Shelley by the indenture of October 13, 1902, as against him and his mortgagees, no title having been acquired by them other than such, if any, as passed by that conveyance; this turns upon the effect of the revocation of the grant of administration to the widow, which grant was made in general terms as on the footing of intestacy, at a time when there was in fact in existence a will of the deceased man appointing executors, two of whom are still living and have proved the same.

The authorities which relate only to personal estate are numerous and are said to be conflicting.

In *Ellis* v. *Ellis* (4), where a grant of administration had been

(1) [1913] A. C. 76, 85.
(2) [1898] 2 Ch. 573, 576.
(3) [1894] 1 Ch. 707, 721, 722.
(4) [1905] 1 Ch. 613, 617.

made under these circumstances and revoked, Warrington J., after reviewing the earlier authorities of *Abram* v. *Cunningham* (1), *Graysbrook* v. *Fox* (2), and *Boxall* v. *Boxall* (3), said: "I think it is clear law that the grant of letters of administration is wholly void, and that, speaking generally, dispositions of the assets by the supposed administrator are void also, the ground of this being that the assets are vested in the executor from the death, and the supposed administrator has no property in them, and no power of dealing with them," and he held that an equitable mortgage of a lease by an administrator, whose grant had been revoked by the subsequent probate of a will appointing an executor, was in the circumstances of the case before him a voluntary act, and that in fact no title was conferred by it.

In *Graysbrook* v. *Fox* (2) it was held in 1565 on demurrer that, if A. makes his will and appoints an executor and the Ordinary after his death commits administration to another, who sells the goods of the deceased, and the executor afterwards proves the will and brings detinue for the goods against the purchaser, the probate supersedes the administration ab initio and the sale made under it, but the Court expressed the opinion that if the administrator had aliened the goods to pay the funeral expenses or debts of the deceased which the executor was compellable to pay, the sale would have been good and indefeasible.

In *Abram* v. *Cunningham* (1), decided in 1677, the Ordinary granted administration de bonis non of an original testator to a creditor, where there had been in fact a will in existence appointing executors, which was "concealed" (as stated in the report in Levinz) or which was "afterwards discovered" (as stated in the reports of the case in Ventris and Freeman), and it was held, after the administration granted to the creditor had been revoked and administration of the estate of the original testator had been granted to the defendant, that the revoked administration was void ab initio, and that a sale of a term made thereunder was also void. Saunders, who argued for the plaintiff, admitted "that where an executor is in esse, who after proves the will,

(1) 2 Lev. 182; 1 Vent. 303; Freem. K. B. 445.
(2) 1 Plowd. 275.
(3) 27 Ch. D. 220.

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administration granted in the meantime, without notice of the will, and all mean acts done by such an administrator are void," citing *Graysbrook* v. *Fox*. (1) In the report of this case in Freeman, in support of the proposition that the Ordinary had no power to commit administration where there was a will and executor in existence unless and until the executor had renounced, Twisden J. cited a case in which it was held that where administration had been committed sixteen years, and a will afterwards found, all sales and acts done by the administrator were void and this report states that the Court in *Abram* v. *Cunningham* (2) was of opinion that "though it were a hard case, after a will hath been long concealed, to avoid all acts done by an administrator, yet the law being so, it might be fit for the Parliament to consider of it; but the Court could not alter it."

In *Boxall* v. *Boxall* (3) Kay J. in 1884 recognized the decision in *Abram* v. *Cunningham* (2) as sound, deciding, however, that a grant of letters of administration obtained by suppressing a will containing no appointment of executors is not void ab initio, and that a sale of leaseholds made thereunder to a purchaser, ignorant of the suppression of the will, was valid, although the grant was revoked after the sale.

The law as above stated in *Graysbrook* v. *Fox* (1) has passed into and been handed down by text-books from the time of Rolle's Abridgment (1668), where at p. 919 it appears that the decision as to the want of power in the Ordinary to grant administration, or to give power to another to dispose of the estate of the testator who had in fact appointed an executor, had then become an accepted authority. In Wentworth's Office of Executors, 1st ed. (1641) p. 60, 10th ed. (1720) p. 48, 14th ed. (1829) p. 115, it is stated that "both the proving and the refusal shall have relation to the death of the testator, as I take it, to divers purposes. So as to the proving, saith the Lord Dyer expressly and confidently in *Graysbrook and Fox's Case* (1); and the resolution also of the case proves it. For there administration being committed before any will proved or notified to the Ordinary, as it should seem, the administrator sold some of the goods to J. S.

(1) 1 Plowd. 275. Freem. K. B. 445.
(2) 2 Lev. 182; 1 Vent. 303; (3) 27 Ch. D. 220.

and after the executors (proving the will) brought an action of detinue for those goods against J. S., who pleaded this administration and sale: and thereupon the executor demurred; and judgment was given for him, as having by the proving of the will disproved the administration ab initio. But it is true that judgment was given only by two judges; one being absent, and the other dissenting in opinion; yet I think it was right and according to law, and that refusal shall have the like relation; else could not the administration relate to the death of the intestate, as it doth to some purposes, expressed in divers books, viz. to have the action of trespass for goods taken before administration committed, and to have a rent growing payable in that mean time." (See also Williams on Executors, 10th ed. pp. 461—462; Ingpen on Executors, pp. 141—142; Halsbury's Laws of England, vol. xiv. pp. 216—217.)

By the Land Transfer Act, 1897, it is provided in s. 1, sub-s. 1, that "Where real estate is vested in any person without a right in any other person to take by survivorship it shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time as if it were a chattel real vesting in them or him." And in s. 2, sub-s. 1: "Subject to the powers, rights, duties, and liabilities hereinafter mentioned, the personal representatives of a deceased person shall hold the real estate as trustees for the persons by law beneficially entitled thereto, and those persons shall have the same power of requiring a transfer of real estate as persons beneficially entitled to personal estate have of requiring a transfer of such personal estate." And in sub-s. 2: "All enactments and rules of law relating to the effect of probate or letters of administration as respects chattels real, and as respects the dealing with chattels real before probate or administration, and as respects the payment of costs of administration and other matters in relation to the administration of personal estate, and the powers, rights, duties, and liabilities of personal representatives in respect of personal estate, shall apply to real estate so far as the same are applicable, as if that real estate were a chattel real vesting in them or him, save that it shall not be lawful for some or one only of several joint personal

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representatives, without the authority of the Court, to sell or transfer real estate." And in the definition clause, s. 24, sub-s. 2: "In this Act the expression 'personal representative' means an executor or administrator."

In *In re Pawley and London and Provincial Bank* (1) it was decided that where a testator dies subsequent to the Land Transfer Act, 1897, having appointed executors, his real estate vests in all the executors and not only in those who prove the will or act in the administration of the estate, and this seems to have been acted upon (notwithstanding the fact that North J. in an earlier case of *John* v. *John* (2), in which the point does not appear to have been argued, had expressed a contrary view) until the passing of the Conveyancing Act, 1911, s. 12, which only applies, however, to dispositions made after the commencement of the Act.

It is contended on behalf of the defendants that as administration when granted dates back to the death—*In the Goods of Pryse* (3)—and that inasmuch as under s. 75 of the Court of Probate Act, 1857, after any grant of administration, no person shall have power to sue or prosecute any suit or otherwise act as executor of the deceased, as to the personal estate comprised in or affected by such grant of administration, until such administration shall have been recalled or revoked, the Land Transfer Act vests a testator's real estate for the time being at least in the person formally constituted administrator in such a case as the present in the absence of fraud, especially in view of the definition in the Act of "personal representative" as being an executor or administrator. Having regard, however, to the language of the Act which provides that the real estate shall devolve to and be vested in the personal representatives or representative from time to time "as if it were a chattel real" and to the decisions above referred to, including especially *Ellis* v. *Ellis* (4), I am unable as long as such decisions stand to accede to this view as regards the testator's real estate in the present case.

By s. 77 of the Court of Probate Act, 1857, it is provided that "Where any probate or administration is revoked under this

(1) [1900] 1 Ch. 58.
(2) [1898] 2 Ch. 573, 576.
(3) [1904] P. 301.
(4) [1905] 1 Ch. 613.

Act, all payments bona fide made to any executor or administrator under such probate or administration, before the revocation thereof, shall be a legal discharge to the person making the same; and the executor or administrator who shall have acted under any such revoked probate or administration may retain and reimburse himself in respect of any payments made by him which the person to whom probate or administration shall be afterwards granted might have lawfully made." And under s. 78: "All persons and corporations making or permitting to be made any payment or transfer bona fide, upon any probate or letters of administration granted in respect of the estate of any deceased person under the authority of this Act, shall be indemnified and protected in so doing, notwithstanding any defect or circumstance whatsoever affecting the validity of such probate or letters of administration."

It was argued on behalf of the defendant Shelley that his payment of purchase-money was made bona fide and that he obtained a legal discharge therefor under s. 77 and that the conveyance to him was a transfer within the meaning of s. 78. In support of this, reliance was placed upon the fact that the law does not expect an executor or administrator to give evidence to a purchaser or enable a purchaser to require evidence from him that any sale by him is necessary in, or in fact made in, the due execution of his trust, and that such a purchaser has a right, therefore, to infer that the executor or administrator is acting fairly in the execution of his duty and is not bound or entitled to inquire as to debts and legacies (see *Oceanic Steam Navigation Co.* v. *Sutherberry* (1); *Solomon* v. *Attenborough* (2); *Allen* v. *Dundas* (3)). *Prosser* v. *Wagner* (4) was also cited for the proposition that every person is bound by the act of a Court having competent authority, and during the existence of such judicial act the law will protect every person obeying it. I am unable, however, for the same reasons to hold that the defendant obtained a good title against the plaintiffs under and by virtue of the conveyance to him of October 13, 1902.

Reliance was also placed on behalf of the defendants on the

(1) 16 Ch. D. 236, 244.
(2) [1912] 1 Ch. 451, 455.
(3) 3 T. R. 125.
(4) 1 C. B. (N.S.) 289.

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Finance Act, 1894, s. 9, sub-s. 5, and s. 8, sub-s. 4, but as the testator's widow did not in my judgment sell the property in question for the purpose of paying estate duty in respect thereof, these sections do not assist me.

A further point taken on behalf of the defendants was that, the estate in question being unlet and incurring loss and expense and there being land charge instalments still unpaid in respect thereof at the date of the contract with the defendant, and auctioneers' and solicitors' charges and expenses outstanding with reference to the abortive sale thereof by auction, the sale to the defendant Shelley must be regarded as one made in a due course of administration and therefore within the exception in *Graysbrook* v. *Fox*. (1) In my judgment, however, as long as the above mentioned decisions stand, this does not avail the defendant, because the sale in question, in reality although not in form, was made by or on behalf of the testator's widow personally and the co-heiresses and not for the purpose of paying debts or duties, and, further, because the exception referred to in the dictum or opinion in *Graysbrook* v. *Fox* (1), in so far as it can stand while the decision remains, must be founded on the doctrine of subrogation in respect of sums which the executor as such is compellable to pay, and therefore so long as the grant of administration in cases like the present is void ab initio no legal estate is passed by the sale before probate.

An argument was also addressed to me to the effect that the rule in *Graysbrook* v. *Fox* (1) no longer prevails, founded upon the form of the administration bond existing at the date of *Abram* v. *Cunningham* (2) and still in use, in which provision is made in the event of it subsequently appearing that the deceased died testate; and also upon a case of *In the Goods of Campbell* (3), in which, a will in existence after a testator's death being accidentally lost and the contents unknown, general administration limited till the original will be found was granted to the widow; and upon a recent case of *In the Goods of Wright* (4), in which, it appearing that a testator had duly executed a will which could not be found after his death, administration was

(1) 1 Plowd. 275, 282.
(2) 2 Lev. 182.
(3) 2 Hagg. Eccl. 555.
(4) [1893] P. 21.

granted to his son until the original will or an authentic copy be brought into the registry, limited to dealing with and completing a sale of leasehold houses belonging to the testator's estate and giving a discharge for the purchase-money thereof. It may be that if an administration be granted "on condition" all acts which the administrator does before the breach of the condition are good; and without expressing any opinion as to the effect of such a provision as the above in administration bonds or of grants of administration such as those made in the cases lastly referred to, I am unable in the circumstances of the present case to do otherwise than follow the rule laid down in *Graysbrook* v. *Fox* (1) and the subsequent decisions which have followed it, the distinction having so long been drawn between grants of administration which are void and such as are merely voidable.

I have also been referred to s. 37 of the Stamp Act, 1815, in which it is enacted that "if any person shall take possession of, and in any manner administer, any part of the personal estate and effects of any person deceased, without obtaining probate of the will or letters of administration of the estate and effects of the deceased, within six calendar months after his or her decease, or within two calendar months after the termination of any suit or dispute respecting the will or the right to letters of administration, if there shall be any such, which shall not be ended within four calendar months after the death of the deceased; every person so offending shall forfeit the sum of one hundred pounds, and also a further sum, at and after the rate of ten pounds per centum on the amount of the stamp duty payable on the probate of the will or letters of administration of the estate and effects of the deceased." On this it was urged that the testator's widow only did her duty in taking out administration as she did, and that if everything known to her had been mentioned to the Probate Court, administration would have been granted to her until the testator's will, if any, should be found. The same answer, in my judgment, applies to this argument.

It was next contended that the effect of the decisions in *Graysbrook* v. *Fox* (1) and *Abram* v. *Cunningham* (2) was that the grant of administration was only a nullity, if at all, for

(1) 1 Plowd. 275. (2) 2 Lev. 182.

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the purpose of protecting the executor, reliance being placed upon certain dicta of Lord Redesdale L.C. during the argument in *Doyle* v. *Blake*. (1) In this case, to prove the administration void, counsel cited *Parten and Baseden's Case* (2), *Hensloe's Case* (3), *Abram* v. *Cunningham* (4), *Wankford* v. *Wankford* (5), and *Graysbrook* v. *Fox* (6), and upon this part of the argument Lord Redesdale L.C. "observed, that some of these old cases could scarcely be supported on principle; they were decided whilst a great jealousy of the Ecclesiastical Court prevailed. That the meaning of the modern determinations was, that an administration granted after an executor having acted in pais might be repealed by an application to the Ecclesiastical Court; not that it was a mere nullity, unless as a protection to the executor. That it was true, an executor having acted, could not discharge himself from liability by such an administration being granted to another; but that a debtor to the fund could not in answer to a suit by such administrator, set up the act in pais of the executor against his renunciation, in order to delay or prevent a recovery by the administrator. That the administration was void, only as a protection to the executor, but in no other sense." These remarks, however, must in my judgment be construed with reference to the case then before his Lordship, in which an executor, having partially acted, renounced in favour of another named in the will as trustee, who obtained administration cum testamento annexo and subsequently died insolvent, and the question in issue was the extent of the executor's liability for the acts of the administrator, and I am not at liberty to treat them otherwise.

Lastly, the defendants contended that the decisions in *Graysbrook* v. *Fox* (6) and *Abram* v. *Cunningham* (4) and the subsequent authorities based thereon only apply in the present day to grants of administration obtained by fraud, reliance being placed for this purpose upon *Errington* v. *Rorke* (7), *Craster* v. *Thomas* (8), and *Debendra Nath Dutt* v. *Administrator-General of Bengal*. (9)

(1) 2 Sch. & Lef. 231, 237.
(2) (1676) 1 Mod. 213.
(3) (1600) 9 Rep. 36b, 37b.
(4) 2 Lev. 182.
(5) (1699) 1 Salk. 299, 307.
(6) 1 Plowd. 275.
(7) 6 Ir. C. L. Rep. 279, 316.
(8) [1909] 2 Ch. 348.
(9) L. R. 35 Ind. Ap. 109.

The first of these cases related to the effect of a conveyance by the commissioners of incumbered estates in Ireland decided in the Irish Exchequer Chamber in 1857 (1) and affirmed in the House of Lords two years later (2), in which the authorities in question were neither referred to nor discussed, but reliance was placed upon a dictum of Richards B. in the Exchequer Chamber (1), which was as follows: "Suppose again that a will is proved, and probate granted, and that the executor named therein sells a chattel interest of the deceased, worth 50,000*l.*, say a term of 1000 years, and distributes the proceeds; and suppose that subsequently a later will turns up, of which probate is duly granted, the former probate being recalled, there it is the rightful owner of the estate who loses his property, and he loses it just as irretrievably as if the sale had taken place in the Incumbered Estates Court, instead of by private contract with the first executor; but the purchaser in that case is all safe, and he is made safe by the general law of the land, and without the aid of the Incumbered Estates Court." I am unable, however, to regard this as modifying what appears to have become settled law in this country.

In *Craster* v. *Thomas* (3) a testator domiciled in England died in 1898 possessed of Indian and English assets, having by his will appointed executors who proved the will in England, but remained in ignorance of the Indian assets until 1903, when they discovered that in the previous year one Cowie, a solicitor in Calcutta, had by fraud obtained an Indian grant of administration to the testator's Indian assets, as on an intestacy, and had sold certain bank shares part thereof to the defendant for value without notice; Cowie was subsequently prosecuted for fraud and convicted, the grant of administration to him revoked, and fresh letters of administration with a copy of the testator's will annexed granted to the Administrator-General of Bengal. Neville J. decided that on the true construction of the Indian Succession Act, 1865 (Act X. of 1865), the sale by Cowie was valid and conferred a good title upon the defendant, stating inter alia that the case before him differed

(1) 6 Ir. C. L. Rep. 279, 316. (2) (1859) 9 Ir. C. L. Rep. 357.
(3) [1909] 2 Ch. 348.

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from *Ellis* v. *Ellis* (1) in that there were no executors in India, and that the proper course for the Indian Court to have taken, had it known the circumstances, would have been to appoint an administrator with a copy of the will annexed. The learned judge also expressed the opinion that s. 262 of the Indian Succession Act, which is substantially the same as s. 77 of the English Court of Probate Act, 1857, validates all payments bona fide made to the administrator, and that that section alone might cover the case before him, the Indian property not being vested in the executors, and although if the property in the shares had vested in the English executors there might have been a difficulty as to the purchaser obtaining it, still, that the estate or whoever represented it would be a trustee of the property in the shares for the purchaser. This decision was expressly based by the learned judge upon Indian law, and the English decisions were distinguished and accepted by him.

In *Debendra Nath Dutt* v. *Administrator-General of Bengal* (2), in a suit upon the bond conditioned for the due administration by Cowie of the testator's Indian estate in the last case referred to, Lord Macnaghten in the Privy Council stated that so long as the letters of administration granted to Cowie remained unrevoked he, although a rogue and impostor, was to all intents and purposes administrator, and that he and he alone represented the deceased in India, his receipts being valid discharges for all moneys received by him as administrator. This is inconsistent with the view that the letters of administration in India were void ab initio, but there were in that case no executors in India, and there is no indication, in my judgment, that the Privy Council intended to throw any doubt upon the English decisions from *Graysbrook* v. *Fox* (3) downwards, nor was the cause of action similar.

For the above reasons I am of opinion that the plaintiffs are entitled to succeed in this action, though I am conscious of the extreme hardship to the defendant Shelley of such a result; how the matter would be decided at the present day and having regard to modern views if it were res integra, as Neville J. was able to treat the case before him, it is not for me to discuss, and I have

(1) [1905] 1 Ch. 613. (2) L. R. 35 Ind. Ap. 109.
(3) 1 Plowd. 275.

no alternative but to give judgment, as I do, for the plaintiffs for recovery of possession of the lands and hereditaments in question, they undertaking, as they have expressed their willingness to do, to hand over to the defendant Shelley or his mortgagees the above mentioned dower fund in exchange for the title deeds. I direct an account to be taken of the rents and profits of such hereditaments received by the defendants or any of them since the death of the testator's widow; and I order the said defendants to pay the plaintiffs' costs of action up to and including this order, with liberty to apply.

Solicitors: *Hedges & Davis; Withall & Withall; Bellord & Co.*

G. R. A.

DOUGLASS *v.* RHYL URBAN DISTRICT COUNCIL.

[1912 D. 1517.]

Corporation—Contract not under Seal—Executed Consideration—Work done at Request of Corporation necessary for Purpose for which Corporation was created—Contract to pay implied from Acceptance of Benefit—Improvement Commissioners—Special Act—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 174.

The defendants as the successors of the Rhyl Improvement Commissioners, who were constituted a body corporate with a common seal by the Rhyl Improvement Act, 1852, with which was incorporated the Commissioners Clauses Act, 1847, were proposing to buy, repair, and extend the Rhyl pier under special powers in the Rhyl Improvement Acts, and definitely employed the plaintiff, an engineer and expert in pier and harbour work, to make a certain valuation and estimates required by the Local Government Board, to which body the defendants, under powers in their special Acts, had applied for sanction to borrow the money necessary for the proposed scheme. There was no contract under the seal of the defendants relative to the employment of the plaintiff, but he made the valuation and estimates of which the defendants had the benefit and made use. Ultimately the scheme was not proceeded with. In an action by the plaintiff to recover his fees:—

Held, that the provisions of s. 174 of the Public Health Act, 1875, did not apply to the contract in question; that in the circumstances the principle of the decision in *Lawford* v. *Billericay Rural Council* [1903]

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1 K. B. 772, applied; and that the plaintiff was entitled to payment upon a quantum meruit.

WITNESS ACTION.

The defendants were the successors of the Rhyl Improvement Commissioners, who were constituted a body corporate with a common seal by the Rhyl Improvement Act, 1852 (15 & 16 Vict. c. xxxii.), which incorporated the provisions of the Commissioners Clauses Act, 1847. By s. 69 of the Rhyl Improvement Act, 1872 (35 & 36 Vict. c. civ.), the Rhyl Improvement Commissioners were empowered to purchase the pier undertaking of the Rhyl Promenade Pier Company, Limited, and by that Act and Part IV. of the Rhyl Improvement Act, 1892, they were empowered to borrow money with the approval of the Local Government Board for the purposes of those Acts.

In 1912 the defendants were proposing to buy and repair, widen, and extend the pier, and applied to the Local Government Board for power to borrow money for those purposes. The Board informed the defendants that it would defer its decision until the defendants had obtained from an independent expert skilled in harbour and pier works a valuation of the existing structure and an estimate of the cost of the works required to put the structure in thorough repair and an estimate of the cost of widening and extending the pier to deep water.

Thereupon the defendants employed the plaintiff, who was an engineer and an expert in harbour and pier work, to make the valuation and estimates required by the Local Government Board, which he accordingly did, and the defendants had the benefit and made use of the valuation and estimates so made. Ultimately the scheme for the purchase of the pier was not proceeded with.

There was no contract under the seal of the defendants relative to the plaintiff's employment in connection with the valuation and estimates above mentioned.

The plaintiff's fees and expenses for making the valuation and estimates amounted to the sum of 1087*l.* 16*s.*, and, the defendants having refused to pay the same, he commenced this action claiming the amount in question and alleging that he was

verbally employed by the defendants pursuant to a resolution carried unanimously by the members of the council at a council meeting on March 8, 1912, and communicated to him by their chairman; alternatively, that the verbal employment was confirmed by the defendant council's minutes and by two letters written to him by their clerk; and, alternatively, that if the alleged contract of employment was for any reason not enforceable against the defendants, he was in the circumstances entitled to the sum in question upon a quantum meruit.

The defendants denied the alleged verbal employment and the authority of their clerk to bind them by the letters in question to employ the plaintiff, and alleged an agreement that if the scheme for purchase was not proceeded with the plaintiff would accept 150 guineas as his fee for making the valuation and estimates, which sum they had paid into Court. Further, the defendants pleaded that the alleged contract if in writing was not signed, and if verbal was not made, by any two of the commissioners acting by the direction and on behalf of the commissioners as required by s. 56 of the Commissioners Clauses Act, 1847, and no notice of the contract was given as required by s. 57 of the same Act; and also that the alleged contract was not under the seal of the defendants as required by s. 174 of the Public Health Act, 1875, and by the common law.

There was a serious conflict of evidence at the trial concerning the matters in issue between the parties.

A. H. Chaytor (*Younger, K.C.*, with him), for the plaintiff. Sect. 174 of the Public Health Act, 1875, only relates to contracts made under that Act, that is, to contracts referred to in s. 173—*Attorney-General* v. *Gaskill* (1)—and does not apply to a case like this. If this work had been done under the powers of the Public Health Act, 1875, the plaintiff would appear to have no remedy: *Hoare* v. *Kingsbury Urban Council* (2); but this was a contract made by the commissioners or two of them verbally under s. 56 of the Commissioners Clauses Act, 1847, and entered in the minute-book in accordance with s. 55 of that Act, and I submit there was a valid contract by the commissioners.

(1) (1882) 22 Ch. D. 537. (2) [1912] 2 Ch. 452.

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[JOYCE J. The local board and not the members of the board are the commissioners.]

At any rate, in the circumstances the plaintiff is entitled to a quantum meruit: *Hodge* v. *Matlock Bath and Scarthin Nick Urban Council* (1); *Lawford* v. *Billericay Rural Council.* (2)

Hughes, K.C., and *P. F. Wheeler*, for the defendants. The question is whether there is any contract enforceable by the plaintiff, and, if so, what that contract is.

The power to purchase the pier undertaking was conferred by the Rhyl Improvement Act, 1872, on the improvement commissioners. Then came the Public Health Act, 1875, by virtue of which the body formed is a new one with the powers of the old, and s. 174 applies. If the urban district council, the new body created under the Act of 1875, have other powers from whatever source, whether by Act of Parliament or otherwise, but not by the Act of 1875, they still, we submit, in exercising those other powers are acting under the Public Health Act, 1875, and s. 174 of that Act applies. The new body is created with the powers of the old authority, but the old body ceases to exist although the old name is retained: *Lea* v. *Facey* (3), which is not consistent with the only argument urged on behalf of the plaintiff, namely, that what was done by the defendants was done by them as improvement commissioners.

It has been suggested that s. 174 has to be read as limited by s. 173. But sub-s. 1 of s. 174 is without doubt mandatory, obliging every contract over 50*l.* by an urban authority to be in writing and under seal: *Hunt* v. *Wimbledon Local Board* (4); *H. Young & Co.* v. *Royal Leamington Spa Corporation.* (5) The present is a strong instance of the importance of having a written contract under seal and not allowing such contracts to be verbal.

Hodge v. *Matlock Bath and Scarthin Nick Urban Council* (1) is the only case which seems to be against the defendants' contention, unless the distinction of that case is that the powers exercised were given to the authority by an Act thirty years

(1) (1910) 8 L. G. R. 958, 1127; 75 J. P. 65.
(2) [1903] 1 K. B. 772.
(3) (1886) 17 Q. B. D. 139; (1887) 19 Q. B. D. 352.
(4) (1878) 4 C. P. D. 48.
(5) (1883) 8 App. Cas. 517.

after the Public Health Act, 1875. *Lawford* v. *Billericay Rural Council* (1) is distinguishable, for in that case the work was for the specific purpose for which the authority was created and was necessary for that purpose, and the decision is an exception to the common law rule that a corporation can only contract under seal.

We submit that the plaintiff is wrong not only at common law, but also under s. 174 of the Public Health Act, 1875, and it cannot be said that the defendants were acting as individual commissioners under the old Act. The evidence shews that all he is entitled to is 150 guineas.

If the plaintiff fails, he ought to pay the costs: *Civil Service Co-operative Society* v. *General Steam Navigation Co.* (2), approved in *F. King & Co.* v. *Gillard & Co.* (3)

Younger, K.C., in reply. Sect. 174 of the Public Health Act, 1875, has no application; the contract was properly entered into under s. 341 of that Act.

In *Hunt* v. *Wimbledon Local Board* (4) and *H. Young & Co.* v. *Royal Leamington Spa Corporation* (5) the attention of the Court was not drawn to the question what contracts were within s. 174.

The borrowing powers of the Rhyl Improvement Commissioners were given to them by their special Acts of 1872 and 1892 alone, and not under s. 233 of the Public Health Act, 1875. There was, we submit, a valid and binding contract by the defendant council under the Commissioners Clauses Act, 1847, made on behalf of the council by two of the commissioners, but if not, then the defendants obtained an estimate of the plaintiff as an independent engineer to meet the requirements of the Local Government Board as a condition precedent to the consideration of a loan, and the work having been executed by the plaintiff and the benefit taken by the defendants, the plaintiff is entitled to a quantum meruit: *Lawford* v. *Billericay Rural Council.* (1)

Then there remains the question whether there was any agreement that the plaintiff should accept 150 guineas if the scheme was not proceeded with.

(1) [1903] 1 K. B. 772.
(2) [1903] 2 K. B. 756.
(3) [1905] 2 Ch. 7.
(4) 4 C. P. D. 48.
(5) 8 App. Cas. 517.

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[JOYCE J. I have before me written documents containing the contract if there be a contract, and I cannot listen to the viva voce evidence relating to the story about the 150 guineas.]

JOYCE J. If the transaction which has given rise to the litigation in this case had been between ordinary individuals and not with a body constituted under the provisions of any Act of Parliament, then, subject to one point, I should have felt no difficulty in giving judgment for the plaintiff. That is the point arising out of this controversy with reference to the 150 guineas. I have already expressed an opinion about that, and although I see no reason to disbelieve what Mr. Douglass has said, there is a very disagreeable and extraordinary conflict of testimony between these people. The circumstances are very peculiar, and upon consideration it appears to me that in a case where the only relevancy of this is to what were the terms of the contract, if any, I must and I shall go by the written documents. There is a plain resolution in the minutes of the board and the letters are plain, and I cannot go outside them merely because some people say that there was some conversation at the meeting. I do not know whether there was or not. I am of opinion that if there was a contract at all with reference to this work done by Mr. Douglass, the contract is to be found in writing, and therefore I disregard all this verbal testimony. There may have been a misunderstanding. We all know by experience how often it is that the various persons present on a particular occasion give a different account of what has passed.

They are not ordinary individuals between whom this transaction took place. One of the parties is an urban district council, and special Acts of Parliament prescribe the particular contracts that they may make. An urban district council is subject by reason of the Public Health Act of 1875 to limitations on its contracts and various other special restrictions.

The defence raised is founded principally on s. 174 of the Public Health Act, 1875, and if the contract in question were one which was clearly made only under the powers and for the purposes of the Public Health Act, then the objection taken under s. 174 would probably be fatal, notwithstanding that the work

had been done, as decided by Neville J. in *Hoare* v. *Kingsbury Urban Council.* (1)

A very strenuous argument was addressed to me by Mr. Hughes on the case of *Lea* v. *Facey.* (2) There the question was with reference not to the 174th section of the Public Health Act, 1875, but to two other sections of the Act in which the words are different from the words in s. 174. In that case the crucial words were "Under the provisions of this Act," and Wills J. gave a decision in which he said (3): "This result appears reasonable so far as the justice and morality of the case are concerned. For one cannot conceive that there should be any reason for subjecting the commissioners in respect to a matter of this kind to heavier liabilities than exist with regard to members of a local board." Then he says, "I cannot help thinking that the Legislature did mean that, whenever the powers of local Acts were by virtue of the Public Health Act attached to the body in its new capacity, the protection of that Act should also attach." That may be right or it may be wrong. I do not say it is right or wrong, but that does not to my mind conclude this case, which so far as this part of it is concerned turns upon s. 174 of the Act of 1875, the words of which are quite different.

There has been a good deal of discussion about the meaning of s. 174 following, as it does, s. 173. I think there may be some conflict between the authorities on the subject. A plausible view of this section is that the contracts there referred to are merely such contracts as are dealt with in s. 173. But I have to decide after fairly considering the argument addressed to me, as I have done in the course of this case, and the authorities which have been cited, and I am of opinion and I decide that the contract in this case is not within the provisions of s. 174 of the Public Health Act of 1875, and that the prohibitive provisions of that section do not apply to this contract.

The defendants have a twofold capacity. They had powers vested in them which originated in the Rhyl Improvement

(1) [1912] 2 Ch. 452. (2) 17 Q. B. D. 139; 19 Q. B. D. 352.
(3) 17 Q. B. D. 146.

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Acts and which had come down from the Rhyl Improvement Commissioners. As a matter of fact they remained the improvement commissioners, as I understand the case—even in title until they were constituted an urban district council—and therefore we have to consider, as they were exercising their powers under the Improvement Acts, whether there is anything in the Commissioners Clauses Act or in any other Act which invalidates the contract sued upon in this case. Mr. Chaytor put to me very ingeniously an argument on s. 56 of the Commissioners Clauses Act, that this contract was made by the commissioners or two of them. As I said at the time, I was not very much impressed with that argument because the members of the local board are not commissioners. It is the board itself which are the commissioners, and at the same time there is a great deal of difficulty in applying s. 56 where the commissioners are incorporated. Mr. Younger put it in another way and said the two commissioners being there it was really a contract by the whole body. I am not sure about that. I think there is a great deal of doubt about it. I do not think I can agree with Mr. Chaytor's argument, and I have great doubt about Mr. Younger's. But at all events the defendants were a corporation, and they were a corporation exercising the powers of the old Rhyl Improvement Commissioners. Therefore their contracts must be under seal with certain exceptions.

Although there may have been a difference of opinion and conflicting authorities, I think it is now settled that, in the absence of an express statutory provision requiring a contract under seal, the requirement of the corporate seal at common law is subject to this exception. Wherever the purposes for which a corporation is created render it necessary that work shall be done or goods supplied to carry such purposes into effect, and orders are given at a corporate meeting regularly constituted and having power to make contracts authorized and necessary for the purposes for which the corporation is created, and the work is done or goods supplied and accepted by the corporation and the whole consideration for the payment executed, there is a contract to pay implied from the acts of the corporation, and the corporation cannot keep the goods or the

benefit and refuse to pay on the ground of mere absence of a formality, or that the fixing of the seal was wanting. The authority for that is the very important case of *Lawford* v. *Billericay Rural Council* (1), which in my opinion has settled the law.

What was done here was done by a corporation. I conceive that under the circumstances it was done under the powers of their Improvement Acts. I do not find any statutory prohibition that applies to the case, and I think it falls within the general principle which I have stated. That being so, I think the plaintiff is entitled on a quantum meruit. I prefer not to rely on Mr. Younger's argument about the contract. I think the plaintiff is entitled to payment upon a quantum meruit. The defendants must pay the costs of the action.

Solicitors: *Hores, Pattisson & Bathurst; Hamlins, Grammer & Hamlins, for F. J. Gamlin, Rhyl.*

(1) [1903] 1 K. B. 772.

R. M.

JOYCE J.
1913
July 16, 17, 18.

KING *v.* BROWN, DURANT & CO.

[1912 K. 697.]

Rights of Common—Trespass by Commoner—Serious Injury to Waste—Suit by Fellow Commoner—Injunction.

One commoner can maintain an action against a fellow commoner for wrongful acts by which the former's right of common is destroyed or interfered with, or which unless stopped would grow into a legal right to the prejudice of the rights of common of the other commoners.

The defendants, who were only entitled to have common of pasture for their cattle levant and couchant over the waste of the manor, were carting goods and refuse to and from their tenement over, and depositing refuse on, a part of the waste of the manor, and admittedly intended to acquire a right of way by prescription:—

Held, that they could be restrained by injunction at the suit of a fellow commoner, and that he need not prove actual pecuniary damage.

WITNESS ACTION.

The plaintiff and defendants were both owners of enfranchised copyholds of the manor of Petworth, in the county of Sussex, and respectively entitled to have common of pasture for their cattle levant and couchant over the waste of the manor in respect of their tenements.

The plaintiff's tenement consisted of two messuages called "Brookside" and "Brookside Cottage" abutting on the Lurgashall Road, and adjoined the defendants' tenement, which was used by them for business purposes and contained general stores, stables, and bakery. The defendants' premises fronted on Petworth Road, a public highway, and were separated at the back by a small stream from a piece of the waste of the manor which adjoined the plaintiff's tenement.

In spite of the plaintiff's protest, the defendants had persisted in placing planks over the stream for the purpose of conveying stores, refuse, or other goods in wagons, carts, or wheelbarrows to or from their premises across the piece of waste, and in so doing had, as the plaintiff alleged, trodden down and injured the herbage of the waste, thereby preventing him from having the use and enjoyment of his common of pasture in so ample and beneficial a manner as he otherwise might have had.

The plaintiff commenced this action for an injunction to

restrain the acts complained of and damages for the obstruction of the plaintiff's right or in the alternative for trespass.

The defendants denied that the plaintiff had suffered any injury, and they alleged that for many years past they had done the acts complained of, and by their pleading claimed to have acquired the right to do those acts and stated their intention to continue to do them. The claim to have acquired any right by prescription, however, was not persisted in at the trial. Further, they raised the question whether the lord of the manor was not a necessary party to the action.

The result of the evidence at the trial appears in his Lordship's judgment.

Ward Coldridge, *K.C.*, and *R. E. Moore*, for the plaintiff. The plaintiff is not complaining of the exercise by the defendants of rights of common, but of the commission by them of acts which they have no right to do. A commoner who does something which is not justified by his position and right as a commoner is in the position of a stranger.

There is evidence of damage in this case, for the planks have broken down the bank and the herbage has been destroyed by the refuse that has been dumped on the waste.

[JOYCE J. Is it material that the plaintiff himself should keep cattle?]

No; that appears from the authorities not to be necessary. In this case the defendants have not proved that there is sufficiency of common left.

In *Williams* v. *Morland* (1) Littledale J. said that any obstruction of a right of common was a sufficient cause of action. Commoners have a right to protect the common, and a commoner may have an action on the case against a stranger or against a fellow commoner: *Robert Marys's Case* (2); *Wells* v. *Watling* (3); *Hobson* v. *Todd* (4); *Pindar* v. *Wadsworth* (5); *Harrop* v. *Hirst* (6); and the plaintiff need not prove any specific damage: *Robertson* v. *Hartopp*. (7)

(1) (1824) 2 B. & C. 910, 916.
(2) (1612) 9 Rep. 111b, 112b.
(3) (1779) 2 W. Bl. 1233.
(4) (1790) 4 T. R. 71.
(5) (1802) 2 East, 154.
(6) (1868) L. R. 4 Ex. 43.
(7) (1889) 43 Ch. D. 484, 500.

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At law it is enough to shew that the act complained of would grow into interference with the right of common.

Hughes, K.C., and *T. L. Wilkinson*, for the defendants. This is really an action of trespass by one commoner against another. Such an action cannot be maintained: Elton on Copyholds, 2nd ed. p. 264, and the authorities there cited; Halsbury's Laws of England, vol. iv. p. 522, pl. 1112. There is no authority in the books for an action for trespass, although there may be an action by one commoner against another commoner for surcharging.

All the cases cited were either cases of surcharging where the defendant was a commoner, or of depasturing where the defendant was a stranger. *Robert Marys's Case* (1) was an action against a stranger and *Wells* v. *Watling* (2), *Atkinson* v. *Teasdale* (3), and *Hobson* v. *Todd* (4) were cases of surcharging. *Robertson* v. *Hartopp* (5) was an action by commoners against the lord.

There has been no disturbance of a right of common in this case; what has been done is only a trespass to the grass, and a commoner cannot maintain such an action even if he shews damage, and no damage has been shewn here.

Ward Coldridge, K.C., in reply. The plaintiff's right of common has been interfered with, and the fact that the tort-feasors are fellow commoners makes no difference; they are wrong-doers who have disturbed the plaintiff in the enjoyment of his rights of common, and they have done it, not in exercising any right of common, but for the purpose of carrying on their business, and with a view to claiming a right of way for their own convenience. Their action has prevented the plaintiff's enjoyment of the common in as ample a manner as before, and the action is maintainable: Elton on Copyholds, 2nd ed. p. 265; Woolrych on Rights of Common, 2nd ed. p. 199.

JOYCE J. This is an action by the owner of an enfranchised copyhold of the manor of Petworth against some persons, a firm or company who are similar owners, for the disturbance of the plaintiff's right of common over the waste of the manor.

(1) 9 Rep. 111b.
(2) 2 W. Bl. 1233.
(3) (1771) 2 W. Bl. 817.
(4) 4 T. R. 71.
(5) 43 Ch. D. 484.

It is impossible to have much sympathy with the defendants, who, having extensive business premises fronting the public highway and separated at the back by a small stream from a piece of waste which adjoins the plaintiff's tenement, persist in from time to time placing planks over the stream, so as to form a sort of bridge, and then conveying refuse of various kinds, including at times manure, on to the waste, sometimes loading it into a vehicle on the waste and sometimes leaving it there, which is obviously a nuisance or annoyance to the persons owning and occupying the adjoining tenement.

Paragraph 5 of the defence is in these terms: "the defendants and their predecessors in title have for thirty years last past and upwards as of right and without any interference or objection save within the last six months from the plaintiff from time to time as they desired placed planks over the said brook in such a manner that one of the ends of each of the said planks rested on the said piece of ground"—that is the waste—"and the other end rested on the defendants' said premises and with their servants and agents with and without carts and wheelbarrows containing and not containing stores and trade refuse passed and repassed to and from the defendants' said premises and the said Lurgashall Road"—that is the road on the other of the plaintiff's piece—"both across the said planks and across such portion of the said piece of ground as is situate between the said Lurgashall Road and the defendants' said premises and unless restrained the defendants intend to continue such conduct. Save and except as hereinbefore stated the defendants deny the allegations" and so on.

What the defendants are doing is that they are seeking by such acts as I have mentioned to acquire and establish a right of way over a portion of the waste, and in effect to occupy and appropriate to their premises a portion of the waste, making it a back road for everything they want to bring to or take out of their business premises and which they prefer not to take in or bring out at the front or principal entrance.

A mere commoner cannot maintain an action against another person having a right of common over the same ground, or even against a stranger, for a simple trespass such as walking over

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the grass of the common, but anything by which a commoner's right of common is disturbed by any unlawful consumption or taking away or destruction of the herbage is actionable even when done by one of the persons having an equal right of common over the same waste. Among ordinary instances of such actions I think perhaps the most common is what is called surcharging, when one of the commoners puts more beasts on the common than the commoner was entitled to put. *Robert Marys's Case* (1) was the case of a stranger attempting to depasture the common by putting beasts on the common; and other instances are driving the cattle of the owner off the common, cutting turf, or quarrying, &c. All these things are actionable whether done by a stranger or by another person entitled to a right of common. A commoner cannot justify any encroachment which really interferes with or prejudices any right of common of his fellow commoner. It is wrong if it interferes with the right of common of his fellow owners, and in particular if it is an act which unlawfully destroys or takes away any grass or herbage, or which unless stopped would grow into a legal right to the prejudice of the right of common of the other commoners.

Now here I do not doubt that what has been done—and what the defendants claim to do—if allowed to continue would naturally and necessarily have the effect of interfering with the grazing of the common—not a large portion, I admit, but that does not matter, it may be a very small portion of the common—and it would be, as at present, and certainly in the future might be still more so, an interference with the rights of the plaintiff and other commoners over this strip of waste between the small stream and the Lurgashall Road. Of course this is quite different from a mere trespass, as by some one walking over the grass of the common; that would be a mere temporary or occasional act of trespass not worth speaking of, and would not necessarily interfere with the common rights to any material extent if persisted in.

In this case it is not, in my opinion, necessary for the plaintiff to prove any actual pecuniary damage at present; the defendants are wrong-doers and there is no justification whatever for their

(1) 9 Rep. 111b.

conduct, and, as they decline to pay any attention to the reasonable remonstrances of the plaintiff, they must be stopped by the Court. The result is that there must be judgment for the nominal sum of one shilling for damages, and there must be an injunction.

Solicitors; *Johnstone & Wiley; Oldman, Cornwall & Wood Roberts, for J. M. Furneaux, Midhurst.*

R. M.

DAVIS *v.* MARRABLE.

[1912 D. 725.]

Ancient Light—Obstruction—Height of Buildings on Servient Tenement raised in one Part and lowered in other Part—No Diminution in Total Amount of Light — No Damage — Negative Easement over whole Servient Tenement.

The plaintiff sought to recover damages for the alleged obstruction to his ancient light caused by the erection on part of the defendants' servient tenement of a building having a tower 35 ft. high and 10 ft. square in the place of a portion of the previous building, which was only 12 ft. 6 in. high, notwithstanding the fact that by the lowering of the remaining buildings on the defendants' servient tenement the total amount of light coming to the dominant tenement over the servient tenement was in no way diminished:—

Held, that the defendants were entitled to credit for the new or increased light coming over their lowered buildings and were not, in the circumstances, liable to pay any compensation, but that having once taken credit for the new or increased light they could not subsequently deprive the dominant tenement of it by restoring the lowered buildings to their former height.

Held, further, that the right to ancient light enjoyed by the dominant tenement was a negative easement over the servient tenement considered as a whole, and, since the decision in *Colls* v. *Home and Colonial Stores* [1904] A. C. 179, the plaintiff had no property or right in or to any particular cones or pencils of rays of light coming in any particular direction over any particular portion of the servient tenement, and that therefore the variation in the heights of the buildings on the servient tenement, although altering the sky line over which the ancient light used to come, conferred no right of action on the plaintiff provided the interference thereby occasioned did not amount to an actionable nuisance within the decision in *Colls* v. *Home and Colonial Stores*.

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Observations of Lord Lindley in *Colls* v. *Home and Colonial Stores* [1904] A. C. 179, 210, 211, and of Lord Atkinson in *Jolly* v. *Kine* [1907] A. C. 1, 7, 8, considered.

WITNESS ACTION.

The plaintiff was owner of a house fronting east on to, and being No. 26, Denmark Hill. On the first floor of the south side of the house, and 12 ft. above the ground level, was a staircase window 5 ft. 3 in. high by 2 ft. 9 in. wide, more than twenty years old, and looking across an alley on to the defendant Marrable's leasehold premises, which originally consisted of a ground floor shop fronting east on to, and being No. 28, Denmark Hill, and of a dwelling-house behind the shop having a ground floor and three upper floors. The ground floor shop was about 12 ft. 6 in. high and projected some 16 or 18 ft. in front of the dwelling-house, and the plaintiff's window had enjoyed for more than twenty years an uninterrupted access of light from the south-east over the flat roof of the ground floor shop, and from the south-west, but at a very high angle, over the roof of the fourth floor of the dwelling-house.

In 1912 the defendants' premises had been altered by the erection of a picture theatre on the site, having a tower 10 ft. square and 35 ft. high on part of the former shop site, and a building on the site of, but lower by one storey than, the former dwelling-house.

Before the tower was finished the plaintiff commenced this action for an injunction to restrain interference with his ancient light and for damages, but the defendants' building, so far as complained of, was hurriedly proceeded with and completed on the Sunday previous to the hearing of the plaintiff's motion for an interlocutory injunction. Upon the hearing of the motion the matter was referred to Mr. Chatfield Clarke to report upon.

At the trial of the action the plaintiff did not press for an injunction, but claimed damages and an inquiry what sum was payable to him by way of compensation for the injury done by the defendants to the light which formerly came to the plaintiff's ancient window, and in assessing such damage no deduction was to be made in respect of any additional light which might be

coming to the ancient window over any other part of the defendants' premises.

The result of the evidence at the trial is stated in his Lordship's judgment. It appeared from the evidence and the experts' report that after the defendants' premises had been altered the plaintiff's window enjoyed a little less morning light but more afternoon light than previously.

The defendants had refused to give any formal undertaking not to raise the building at the rear of the tower to the former height of the dwelling-house.

Cunliffe, K.C., and *Woodfin*, for the plaintiff. The plaintiff does not now press for an injunction, but he claims damages for interference with his ancient light.

The evidence shews clearly that the defendants by building their tower have obstructed the access and use of light over their shop enjoyed by the plaintiff's window for the full period of twenty years, and that the obstruction so caused amounts to an actionable nuisance.

In estimating the damages the increased light coming over the lowered portion of the defendants' premises ought not to be taken into account. That point has been considered and dealt with by several judges. In *Colls* v. *Home and Colonial Stores* (1) Lord Lindley says: "As regards light from other quarters, such light cannot be disregarded; for, as pointed out by James V.-C. in *Dyers' Co.* v. *King* (2), the light from other quarters, and the light the obstruction of which is complained of, may be so much in excess of what is protected by law as to render the interference complained of non-actionable. I apprehend, however, that light to which a right has not been acquired by grant or prescription, and of which the plaintiff may be deprived at any time, ought not to be taken into account." The latter observation is directly applicable to this case, and we rely upon it very strongly.

Again, in *Kine* v. *Jolly* (3) Romer L.J. in the course of his judgment says: "I think that, in considering what according to

(1) [1904] A. C. 179, 210, 211. (2) (1870) L. R. 9 Eq. 438.
(3) [1905] 1 Ch. 480, 497.

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the ordinary notions of mankind is sufficient light for the comfortable use and enjoyment of the house, one ought to bear in mind the locality, and also the amount of light coming from other sources, assuming that it is light to which the plaintiff is entitled by grant or prescription," and then he cites the passage from Lord Lindley's speech already mentioned.

Again, in *Jolly* v. *Kine* (1) Lord Atkinson says: "Of course, in determining whether or not the quantity of light which the owner of the dominant tenement will, after the obstruction complained of, continue to enjoy is sufficient within the meaning of this decision, regard can only be had to the light which that owner is by grant or prescription legally entitled to enjoy. And light which may with impunity be at any time obstructed, windows which may at any time be almost entirely blocked up or altogether darkened, must necessarily be left out of consideration." Those passages clearly shew that, in estimating the amount of interference with ancient light, other light to which the dominant tenement is not entitled by grant or prescription is not to be taken into account, and since *Colls* v. *Home and Colonial Stores* (2) was decided, that view has been adopted and expressed in the following text-books: Goddard on Easements, 7th ed. p. 489; Gale on Easements, 8th ed. p. 335: Combe on Light, pp. 26—29; Halsbury's Laws of England, vol. xi. p. 307, par. 596.

If the increased light from the defendants' lowered premises is to be taken into consideration, then the plaintiff may find his window deprived of light altogether, for the defendants have refused to give any undertaking not to restore the lowered premises to the former height of their dwelling-house, and if they sever their property and sell the former dwelling-house portion in a year or two to a purchaser, the plaintiff will have no remedy against that purchaser if he choose to restore the dwelling-house portion to its former height by adding a fourth floor, inasmuch as the plaintiff will not have enjoyed for twenty years the access and use of light over the dwelling-house portion as at present altered. The application of that test shews that the new light must not be taken into account and disposes of the defendants' case altogether.

(1) [1907] A. C. 1, 7, 8. (2) [1904] A. C. 179.

Identity of ancient light still exists: *Andrews* v. *Waite* (1): and we ask for an inquiry as to damages payable to the plaintiff for the injury done by the defendants to the light which formerly came to the plaintiff's window, leaving out of consideration the new light coming over the defendants' dwelling-house.

Hughes, K.C., and *H. E. Wright*, for the defendant Marrable. The only question to be determined is, has this defendant's alteration of his premises materially diminished the plaintiff's light, and for that purpose the net result alone has to be taken into account. The report and evidence shew that no substantial diminution of light has resulted from the alteration, and the plaintiff consequently has no cause of action: *Colls* v. *Home and Colonial Stores* (2); *Jolly* v. *Kine* (3); *Higgins* v. *Betts*. (4)

Since *Colls* v. *Home and Colonial Stores* (2) a right to light is not a right of property in particular light or cones of light, but a right of the dominant tenement not to have its light which comes over the servient tenement obstructed so as to make the dominant house uncomfortable or so as to be a nuisance. If the plaintiff's contention be right he might sue although the result of the alterations might be that he obtained a better light.

The buildings on the servient tenement must be considered as a whole; it is fallacious to take particular pieces of the servient tenement and say of them that the plaintiff is entitled to have the particular light coming over those particular pieces.

The extracts from the speeches and judgment in *Colls* v. *Home and Colonial Stores* (2) and *Jolly* v. *Kine* (5) upon which the plaintiff relies relate to the light coming from other quarters and not over the servient tenement, and are fatal to the view that the plaintiff is entitled to particular light coming over particular pieces of the servient tenement.

The right of the plaintiff as owner of the dominant tenement is to have a sufficient amount of light coming over the servient tenement, and no alteration of the latter matters or affords any ground of complaint so long as sufficient light is left for the window in question. To decide otherwise would be to go entirely

(1) [1907] 2 Ch. 500.
(2) [1904] A. C. 179.
(3) [1907] A. C. 1.
(4) [1905] 2 Ch. 210.
(5) [1907] A. C. 1; [1905] 1 Ch. 480.

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against what was laid down in *Colls* v. *Home and Colonial Stores*. (1)

The plaintiff's claim for an inquiry is professedly based upon *Andrews* v. *Waite* (2) and is not consistent with *Colls* v. *Home and Colonial Stores*. (1) Since the decision in that case, one has to go back to the law as it was before s. 3 of the Prescription Act, 1832, and the test in this case is, not over what part of the servient tenement the light now comes, but whether the interference with the plaintiff's light amounts to a nuisance, and we submit tha clearly it does not.

Maugham, for the defendant freeholder. Since *Colls* v. *Home and Colonial Stores* (1) the question of interference with light has to be judged by the standard of nuisance and the effect which the alleged obstruction has upon the inside of the room affected. The question to be considered is how much light comes, not how it comes. If the servient tenement had a big gable opposite to and to one side of the dominant tenement, and the gable was taken down and rebuilt on the other side of the servient tenement, that would not afford any ground of complaint. It is idle now to talk of cones or pencils of light; *Colls* v. *Home and Colonial Stores* (1) disposed of all that and shews that nuisance is the test.

Before the Prescription Act, 1832, uninterrupted enjoyment for twenty years was sufficient at common law to raise the presumption of an agreement on the part of the owner of the servient tenement not to obstruct the light coming to the dominant tenement: *Cross* v. *Lewis* (3); *Moore* v. *Rawson*. (4) The Act gives an additional method, but the old law still remains and would meet a case, for instance, where the servient tenement consisted of a garden with a house on one side of it, and the house is pulled down and built on the other side of the garden; there the owner of the servient tenement in rebuilding would be bound by the presumed agreement not to obstruct the quantum of light coming to the dominant tenement, and if the servient tenement came to be severed and to belong to different owners an agreement on the part of both those owners would be

(1) [1904] A. C. 179.
(2) [1907] 2 Ch. 500.
(3) (1824) 2 B. & C. 686.
(4) (1824) 3 B. & C. 332.

presumed. The old law before the Prescription Act, 1832, was relied on in *Colls* v. *Home and Colonial Stores* (1) and *Aynsley* v. *Glover*. (2)

An alteration of the buildings on the servient tenement in such a way as to alter the sky line but not so as to diminish the quantum of light coming to the dominant tenement does not give a right of action to the owner of the latter, because the position is that there has been no breach of the presumed agreement that the quantum of light shall not be interfered with.

The present plaintiff has no right to each separate lateral foot of light and has suffered no damage.

Cunliffe, *K.C.*, in reply. There is no authority whatever for saying that the dominant tenement is no longer entitled to particular cones of light; all that *Colls* v. *Home and Colonial Stores* (1) decided was that the dominant tenement was only entitled to so much of the cones of light left by the obstruction as will not constitute the obstruction an actionable nuisance.

The same argument was used by the same counsel on behalf of the defendant in *Kine* v. *Jolly* (3) as has been urged on behalf of the defendant Marrable in this case, and Cozens-Hardy L.J. said he could not accept it.

If the defendants' argument is right, then it would follow that the defendants might build up all round the plaintiff's window, and so long as, by means of glazed tiles or some other artificial means, the window gets as much or more light, then the plaintiff would have no right of action, but the Courts have decided to the contrary: *Dent* v. *Auction Mart Co.* (4); *Black* v. *Scottish Temperance Life Assurance Co.* (5)

Cur. adv. vult.

June 23. JOYCE J. The plaintiff in this case is the lessee of 26, Denmark Hill. This consists of a shop and offices on the ground floor used for the business of a pawnbroker combined with that of a jeweller, with rooms above occupied as a dwelling-

(1) [1904] A. C. 179.
(2) (1875) L. R. 10 Ch. 283.
(3) [1905] 1 Ch. 480, 484.
(4) (1866) L. R. 2 Eq. 238, 251.
(5) [1908] 1 I. R. 541.

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house by the manager of the shop and his family. It fronts east. In the wall of the southern side of the building is a staircase window that has existed more than twenty years, on the first floor looking south, or to be quite accurate looking a little east of south, upon a new building recently erected by one of the defendants for and used as a picture theatre or something of that kind, upon the site of a house and shop No. 28 removed to make way for the picture theatre. Between the plaintiff's building and the defendants' is an alley or passage, which I make out to be a public way, varying in width from 9 ft. to 10 ft. In order to understand it I have looked at the place,—not to obtain evidence,—but I have looked at the place with a view to understanding better the evidence that was adduced. At or opposite the plaintiff's window the width of the alley or passage-way may be taken to be 9 ft. 6 in., but going west from the window it opens out and becomes very much wider.

The plaintiff complains of obstruction by the defendants' new building to the access of light which by, or through, the window was previously enjoyed over the passage and the former building of the defendants. This building consisted of a dwelling-house of three floors above the ground floor with a shop in front on the ground floor. This shop projected beyond the rest of the building to the east so as to abut upon the actual street or road called Denmark Hill. The eastern wall of the higher or main portion of the defendants' building, from which the shop projected, was as nearly as might be in a straight line with the eastern side of the window, the plane of the window being approximately at right angles to that of this wall. The window in question is a narrow one less than a yard in width, to be precise, 2 ft. 9 in., and 5 ft. 3 in. in height. I am not sure whether they measured the window frame or the glass, but it is 2 ft. 9 in. in width and a good deal darkened—that appears on one of the plans—by a rather close network of thick bars in front. Of course there are jewels and other valuable things behind, which accounts for that. The sill is about 12 ft. above the level of the ground in the alley or passage.

The shop in front of the defendants' old building was, I understand, one storey only in height, the main building, the

dwelling-house behind it, being much higher, three storeys in addition to the ground floor. Upon the plaintiff's window the rays of sunlight when the sun was visible in the early morning came, as they do still, in a slanting direction, and also for some three hours or so before noon or thereabouts had a free passage over the roof of the shop then forming the front part of the defendants' building. In the afternoon, that is from noon until near evening, the direct light of the sun when visible was actually obstructed and prevented by the back or main part of the defendants' building from shining upon the window. Of the defendants' new building, a portion erected upon part of the site of the old shop is in the form of a tower, 10 ft. square and as far as I make out 35 ft. in height to the cornice—that is not very high, 5 ft. more than the width of this Court; the height of the portion behind, that is the main portion of the defendants' new building, being very much less than that of the defendants' old building which formerly occupied the same site, that is to say, the old dwelling-house.

The general result upon the whole is in my opinion that the access of light over the defendants' property to the plaintiff's window is rather improved than otherwise, and assuming the height of the different portions of the defendants' building to remain as at present, there is no actual damage occasioned by the alteration of defendants' building and the window in question is quite sufficiently well lighted. I think the plaintiff's principal witness, Mr. Pratt, really agrees with that. The evidence of opinion as to there being a diminution in value for letting and so on, by reason of alteration in the access of light to the window, I am unable to accept. I do not believe it. Whether the fact of the building nearest to the plaintiff on the south being converted into a picture palace is injurious or not to the plaintiff's leasehold I do not know, nor is it material. But there has been no such obstruction by the alteration of the defendants' building to the access of light over it as to affect the value, capital or otherwise, of the plaintiff's premises. This I say notwithstanding any evidence adduced to the contrary. I agree with the opinion of Mr. Chatfield Clarke, to whom it was referred by me to report.

In other words I find as a fact that no actual damage has

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been occasioned by deprivation of light in consequence of the alterations made by the defendants. If and when the sun is shining there is less direct sunlight for a time before noon while the sun is behind the so-called tower 10 ft. square, but in the afternoon and evening there is much more than before. Considering the greatest altitude which the sun attains in this latitude, the sun's rays at no time after noon could, as I believe, reach either the bottom or the top of the window, that is before the alterations. Now taking the vertical angle from the centre of the window, the back or main part of the defendants' building nowhere subtends an angle of more than forty-five degrees or thereabouts with the plane of the horizon, and to the west this angle is much less. I am aware that the plan puts it at forty-eight degrees, but it is taken from the bottom of the window. It appears to me the point to take it from is the centre.

The defendants' building so far as complained of was completed before the hearing of the motion for an interlocutory injunction. There is no question of injunction before me. The plaintiff's counsel very properly conceded that point and claimed damages, but although at the present time there has been no actual damage by the alterations, considered as a whole, that the defendants have made, quite apart from the question whether the window or the interior of the plaintiff's building through such window be upon the whole well and sufficiently lighted or not, the plaintiff claimed an inquiry in the following terms: "An inquiry what sum of money is proper to be paid to the plaintiff by the defendants by way of compensation for the injury that has been done by the defendants to the light which formerly came to the plaintiff's ancient window and in assessing such damage no deduction is to be made in respect of any additional light which may be coming to the said ancient window over any other part of the defendants' premises."

Referring to the various authorities, or supposed authorities, upon the subject, the plaintiff's counsel contend that the plaintiff is entitled to damages for the obstruction occasioned by the raising of the small portion of the defendants' building, where it stands upon the site of the old shop, about 10 ft. square,

and that the fact of all the rest of the building being lower is quite immaterial and ought not to be considered at all. The plaintiff's contention, as is admitted, would be just the same if the defendants had erected the square tower only and removed all the rest of their building leaving the site of that vacant. The authorities cited (mostly dicta), whether right or wrong, appear to me to refer not to access of light over another part, or the various parts considered as between themselves, of the same building or tenement, but from or over a different tenement of a different owner. In none of these cases did the judge consider, or have in contemplation, such a case as the present. I will take what Lord Lindley says, as a fair sample of the whole, in *Colls* v. *Home and Colonial Stores* (1): "As regards light from other quarters, such light cannot be disregarded; for, as pointed out by James V.-C. in *Dyers' Co.* v. *King* (2), the light from other quarters, and the light the obstruction of which is complained of, may be so much in excess of what is protected by law as to render the interference complained of non-actionable. I apprehend, however, that light to which a right has not been acquired by grant or prescription, and of which the plaintiff may be deprived at any time, ought not to be taken into account." In the case before me the only access of light to be considered is from or over the tenement of the defendants. There is no question of light from "other quarters," in the sense in which that phrase is used by Lord Lindley.

Again, counsel for the plaintiff say, suppose that the Court holds the defendants not liable to make compensation in respect of any obstruction by the front part of the defendants' building because the other part is much lower and the light improved, the defendants might to-morrow or next year raise the back or main portion of their present building to the former height, and that in respect of any obstruction so occasioned the plaintiff would be without remedy because the present amount of access (if I may use such an expression) of light over this particular part of the defendants' building, that is the back, would not have been enjoyed for the full period of twenty years. They say that the new or increased light over the defendants' building might, to

(1) [1904] A. C. 179, 210, 211. (2) L. R. 9 Eq. 438.

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use Lord Atkinson's phrase in *Jolly* v. *Kine* (1), be taken away with impunity. Upon consideration I do not accept this contention. The defendants say, and as I think truly, looking at the whole of their building and the manner in which the main part of the building was lowered, there is no deprivation of light. I rather think *Gandy* v. *Gandy* (2) shews that if the defendants on this occasion take credit for the additional light which comes over the main part of the building as lowered, they could not on some future occasion say to the Court, or the Court would not hear them say, that such light could be taken away with impunity. In *Gandy* v. *Gandy* (2) the last point which was decided was that the defendant was not at liberty to retain the benefit of a decision given on the footing that his liability under the covenant continued and at the same time to insist that his liability under it had determined.

However, quite apart from that, the plaintiff had or has a negative easement over the tenement of the defendants which precluded them, that is the defendants, from seriously obstructing the access of light from or over such tenement. By seriously obstructing I mean obstructing to such an extent as to make the obstruction actionable within the decision of *Colls* v. *Home and Colonial Stores*. (3) If the defendants were now to raise or alter their present building so as seriously to obstruct or diminish the light now enjoyed, they would be obstructing and diminishing the amount of light enjoyed at all times during the preceding twenty years over the servient tenement, and that would prima facie be actionable.

There is no longer, as was supposed before the decision in *Colls* v. *Home and Colonial Stores* (3), any proprietorship in the plaintiff or right to any particular cones or pencils of rays, by which I mean cones or pencils of rays coming in any particular direction or directions; his only right is to require the access of light over the defendants' servient tenement to be not so obstructed or diminished as to cause a nuisance in law. Neglecting, as we may, the intervening alley, before any of the defendants' alterations, the only access of light to or for the

(1) [1907] A. C. 1, 8. (2) (1885) 30 Ch. D. 57.
(3) [1904] A. C. 179.

plaintiff's building or staircase window enjoyed therewith was from or over the servient tenement of the defendants. The plaintiff had no easement of light or indeed any access or use of light from or over any other tenement than that of the defendants. There is no question of light coming from other quarters. Speaking broadly, the plaintiff has now coming over the tenement of the defendants as much light as he had for the last twenty years before the alterations—possibly and probably a little more. The defendants cannot now, by raising the back or any other part of their building, or otherwise, seriously diminish or obstruct the access of light over their servient tenement which had been enjoyed during the whole of the last twenty years before such alteration and which is now being enjoyed with or without some slight increase. Prima facie the plaintiff is entitled to at least as much light as the smallest amount enjoyed at any time during the previous twenty years. Therefore the defendants are not entitled now, by raising any part of their building, to diminish that amount seriously, meaning thereby, as I said before, to such an extent as to make the obstruction actionable within the decision of *Colls* v. *Home and Colonial Stores.* (1)

The result is that the action must be dismissed, because I think the plaintiff is not entitled to any compensation by way of damages in the circumstances, but having regard to the novelty and difficulty of the case and the conduct of the defendants in rushing on their building the moment they had notice of the plaintiff's complaint and getting it completed on the Sunday before the application of the plaintiff to the Court could be brought on, I think they ought not to have any costs. There will be no costs on either side.

Solicitors: *Dallimore, Pilbrow & Co.; Isadore Goldman; George Tilling.*

(1) [1904] A. C. 179.

R. M.

EVE J. 1913 *Feb.* 10, 11, 12, 13, 18, 19, 20; *May* 27, 28; *July* 15.

PHILLIMORE *v.* WATFORD RURAL DISTRICT COUNCIL.

[1912 P. 364.]

Local Government—Sewage Farm—Nuisance—Discharge of Sewage on Private Land—Smell—Conveyance—Construction—Express or Implied Grant—Agricultural Ditch—Sewer "made by any person for his own profit"—Injunction—Damages—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 4; *s.* 13, *sub-s.* 1; *ss.* 15, 16, 17.

An agricultural ditch made by a landowner for the sole purpose of draining his land and fed by surface water alone comes within sub-s. 1 of s. 13 of the Public Health Act, 1875, as a sewer made by a person for his own profit, and does not vest in the local authority.

Sykes v. *Sowerby Urban Council* [1900] 1 Q. B. 584, followed.

By the conveyance on sale to the defendants of a piece of land forming part of the site required by them for a pumping outfall for sewage, there was also granted the free right of passage and running of water from the piece of land through a drain or watercourse drawn on a plan to the conveyance, the defendants cleansing, repairing, or renewing the same so as not to cause a nuisance. The defendants allowed part of the sewage effluent from their farm to flow on to the lands of the plaintiff and into the channel or drain in question, and justified it by express or implied grant from their vendor and also under their statutory powers:—

Held, on the construction of the deed, that there was no express or implied grant of the right to discharge the effluent on to the plaintiffs' land, and the plaintiffs were entitled to an injunction to restrain the defendants from permitting any sewage effluent to be discharged into the ditch or sewer, but the operation of the injunction would be suspended for six months.

Held, further, that the plaintiffs were entitled to 40*s.* damages in respect of each of the claims as to the underground flow of sewage and the nuisance caused by smells.

THE plaintiff, Robert Charles Phillimore, was the owner in fee simple of certain fields at Radlett in the county of Hertford, adjoining land used by the defendants as the site for the outfall of the sewage of Radlett. The co-plaintiff, Robert Smith, was the occupier and farmer of the said fields as yearly tenant to R. C. Phillimore. The defendants pumped sewage on to or otherwise caused the same to be collected on the said site.

By a conveyance on sale dated October 10, 1900, a piece of land comprising about two and three-quarters acres was conveyed to the defendants for the purposes of a sewage farm by the

predecessor in title of the plaintiff Phillimore, together with a free right of passage and running of water from the said piece of land thereby assured, through a certain drain or watercourse shewn on a plan drawn on the indenture and thereon coloured blue, the defendants, their successors or assigns, cleansing and repairing or renewing the same, so as not to cause a nuisance to the predecessor in title of the plaintiff R. C. Phillimore or his tenants. Other land was also acquired by the defendants at the same time, the total acreage of the sewage farm being about seven and three-quarters acres. The plaintiffs alleged that the defendants permitted parts of the effluent of the sewage so pumped or caused to be collected on the said site to flow or be discharged on to the fields of the plaintiffs in such a manner as to damage the grass and cause the land to become sour and waterlogged, and also that they discharged part of the same effluent into the drain or watercourse marked blue on the plan.

If, which the plaintiffs denied, the drain or watercourse was a natural stream or watercourse within the meaning of s. 17 of the Public Health Act, 1875, as the defendants alleged, then the plaintiffs said that the effluent was not freed from all excrementitious or other noxious matter as would affect or deteriorate the quality and purity of the water in the stream. The plaintiffs further said that the defendants dealt with the sewage so as to cause offensive smells to spread over the fields, and they claimed an injunction to restrain the defendants from causing or permitting any sewage effluent to flow or to be discharged from the site of the sewage outfall on to the adjoining fields of the plaintiffs or into the drain or watercourse shewn on the plan, and from occasioning a nuisance by offensive smells; and they also claimed damages.

The defendants alleged that, in exercise of their powers as the rural sanitary authority for the rural district of Watford, and as part of a scheme for dealing with the sewage of Radlett, they had purchased the site for the pumping outfall, as the predecessors in title of the plaintiff Phillimore were well aware, and that they were discharging a pure effluent from the site into the natural watercourse coloured blue on the plan, and not so as to

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create any nuisance. They further alleged that the drain or watercourse was a sewer within the meaning of the Public Health Act, 1875, and that under the powers of s. 16 of the Act they had carried and were entitled to carry the sewage effluent through the lands of the plaintiffs.

A large mass of evidence was adduced on the various points raised, the result of which sufficiently appears from the judgment.

P. O. Lawrence, K.C., and *Fischer Williams*, for the plaintiffs. By s. 27 of the Public Health Act, 1875, a local authority has power to acquire land for a sewage farm, but not so as to create a nuisance. We rely upon the principle of *Rylands* v. *Fletcher*. (1) If the defendants bring this sewage on to the land they must take care that it does not leak out so as to cause a nuisance to their neighbours. The principle of *Rylands* v. *Fletcher* (1) was applied to sewage by Parker J. in *Jones* v. *Llanrwst Urban Council*. (2) Our case is that the defendants turn sewage on to our land and cause it to percolate underground so as to cause damage. The effluent from the sewage farm which is turned into the channel or ditch is sewage, and it is immaterial whether it is more or less purified: *Brown* v. *Dunstable Corporation*. (3)

Clayton, K.C., and *J. E. Harman*, for the defendants. Under the terms of the conveyance of October 10, 1900, there is an express grant of the right for the passage of water into this ditch and it has been so used. There was no suggestion before the action was brought that the effluent in the ditch was noxious, nor was any complaint made of smell. The principle laid down in *Rylands* v. *Fletcher* (1) is admitted, but it does not apply to the present case. It is said that we had no right to send down an effluent, whether pure or impure, so as to increase the burden, according to *John Young & Co.* v. *Bankier Distillery Co.* (4), but here it was done with the consent of the owner.

There is no doubt a qualification prescribed by s. 17 of the Public Health Act that the effluent must be free from excrementitious matter. Our contention is that this ditch was a

(1) (1868) L. R. 3 H. L. 330.
(2) [1911] 1 Ch. 393.
(3) [1899] 2 Ch. 378.
(4) [1893] A. C. 691.

natural stream or watercourse within the meaning of that section, or, if not, then it is a sewer which is vested in us under s. 13 as the local authority and may be utilized as such: *Durrant* v. *Branksome Urban Council* (1); *Attorney-General* v. *Birmingham, Tame and Rea District Drainage Board.* (2)

Under s. 16 of the Public Health Act a local authority is empowered to carry a sewer "into through or under" any lands within the district: *Roderick* v. *Aston Local Board.* (3) If the plaintiffs' contention is right the defendants would be bound to reform their whole sanitary system. [They also referred to *Glossop* v. *Heston and Isleworth Local Board* (4); *Attorney-General* v. *Dorking Union* (5); *Attorney-General* v. *Clerkenwell Vestry* (6); *Tottenham Urban Council* v. *Williamson & Sons, Ld.* (7); *Rickards* v. *Lothian* (8); *Ferrand* v. *Hallas Land and Building Co.* (9); *Holland* v. *Lazarus* (10); *Acton Local Board* v. *Batten* (11); *Wilkinson* v. *Llandaff and Dinas Powis Rural Council.* (12)]

On the whole case we submit that no injunction should be granted in respect of any of the causes of complaint. At the most it is merely a quia timet action, and the damage is inappreciable: *Fletcher* v. *Bealey.* (13)

P. O. Lawrence, K.C., in reply. This channel is not a sewer within the Act. It is an ordinary ditch or drain for purely agricultural purposes. But if it is a sewer it comes within the exception in s. 13, sub-s. 1, of the Act, and does not vest in the local authority inasmuch as it was made for profit by the owner of the land: *Sykes* v. *Sowerby Urban Council.* (14)

Cur. adv. vult.

July 15. EVE J. delivered the following written judgment:— In October, 1900, the immediate predecessor in title of the plaintiff Phillimore assured to the defendants two pieces of land

(1) [1897] 2 Ch. 291.
(2) [1910] 1 Ch. 48.
(3) (1877) 5 Ch. D. 328.
(4) (1879) 12 Ch. D. 102.
(5) (1882) 20 Ch. D. 595.
(6) [1891] 3 Ch. 527.
(7) [1896] 2 Q. B. 353.
(8) [1913] A. C. 263.
(9) [1893] 2 Q. B. 135.
(10) (1897) 66 L. J. (Q.B.) 285.
(11) (1884) 28 Ch. D. 283.
(12) [1903] 2 Ch. 695.
(13) (1885) 28 Ch. D. 688.
(14) [1900] 1 Q. B. 584.

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situate at Aldenham, in the county of Hertford, containing $2\frac{3}{4}$ acres and three acres and ten perches respectively, to be used with another two acres or thereabouts acquired at the same time from Lord Rendlesham, as a site for a pumping outfall for the sewage of Radlett. The land in question formed part of the Phillimore Hertfordshire estate and is surrounded by land of which the plaintiff Phillimore is now owner in fee, and of most of which his co-plaintiff is in occupation as a yearly tenant.

The plaintiffs complain that the sewage outfall site, which has been conveniently referred to as "the sewage farm," has been so used as to occasion them damage in that sewage effluent has been allowed to flow and has been discharged therefrom on to, and offensive smells have been spread over, the adjoining lands of which they are respectively owner and occupier, and they claim injunctions to restrain such user in the future, damages, and costs.

The defendants deny that they have occasioned any damage to the plaintiffs or either of them, and the existence of any offensive smells. They admit the discharge of the effluent, but assert that it is a pure effluent discharged into a natural watercourse in a careful, proper, and lawful manner, and not so as to create any nuisance, and allege that they are entitled so to discharge the effluent by implied or express grant from their vendor and by their statutory powers. In the alternative they plead that the watercourse is a sewer within the meaning of s. 16 of the Public Health Act, 1875, which they have carried, and do and are entitled to carry, into and through the lands of the plaintiffs, and into which they have discharged, and do and are entitled to discharge, the sewage effluent.

In the foregoing observations I have endeavoured to summarize the issues which emerge for determination after a trial which occupied several days. A large amount of time was inevitably consumed in ascertaining the methods adopted by the defendants, the local conditions as to gradients, levels, surface, subsoil, and the like, the views of the experts as to the absorbent capacities of the site, and its adequacy in area and otherwise for the requirements of the present population, the dates and conditions on and under which samples of the effluent were taken, and the variations

in character of the samples under analysis. In addition to this evidence there was, as is usual in a case involving the question of an alleged nuisance, a mass of testimony contributed on the one hand by those who spoke to a sensible nuisance arising from smell, and on the other by those who wholly denied the existence of any appreciable smell at a very short distance from the settling tanks.

It is not necessary for me to deal with the evidence falling under the former of these two categories in detail, the less so because a good deal of it went to matters which are either no longer material or upon which there is no substantial difference in the results arrived at by the respective experts. As a general result of this evidence I think it may be taken that the site, area, character, and general physical conditions of the farm are, in the main, suitable and sufficient for the purpose for which it was acquired, that its capacity for dealing with the sewage at present deposited upon it is not yet exhausted, that the farm has not yet become sewage sick, and that, except under adverse and unfavourable weather conditions, the deposited sewage is dealt with by filtration and produces an effluent of a satisfactory standard. But it is not disputed that this effluent is discharged into what I will call a channel outside the limits of the farm, and the plaintiffs have satisfied me that there is also some flow under the surface of liquid in the process of filtration from the farm on to their land. Do these conditions afford the plaintiffs any cause of action ?

I will deal first with the discharge of the effluent. The defendants rely first upon the fact that the land was sold to them for the express purpose of being used for a sewage farm, and for no other purpose, and that the vendor in the conveyances stipulated for and reserved a right of pre-emption in the event of the premises no longer being required for such purpose. They urge that this consideration and the facts that every one must have appreciated that sooner or later an effluent would have to be dealt with, and that the obvious, if not the only, channel into which such effluent would be discharged was the one into which they have in fact discharged it, all combine to preclude the plaintiffs from now complaining of the discharge of the effluent.

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I do not accept this view. There is nothing in my opinion in the circumstance that the vendor was cognizant of or even party to the scheme for the acquisition of part of his land for a sewage farm which estops him, or those claiming under him, from asserting that he did not thereby subject his adjoining land to the burden of receiving the effluent, and in so far as the arguments of the defendants are based on the existence of an obvious channel for carrying off such effluent, they are effectually disposed of when the fact is appreciated that the channel is not itself a soak away for the effluent, but only conducts it into a pit on land of a third person in which the defendants do not claim to have acquired any interest.

The defendants next contend that as to part of the land acquired, that is to say the two and three-quarters acres piece, they have an express grant of the right to discharge the effluent into the channel I have mentioned. The grant, which follows the description of the land, is in these terms: "Together with the free right of passage and running of water from the said piece of land hereby assured through the drain or watercourse shown on the said plan and thereon coloured blue, the council their successors or assigns cleansing and repairing or renewing the same whenever necessary and using the same so as not to create a nuisance to the vendor or his tenants." The drain or watercourse coloured blue on the plan includes the whole channel down to the point where it reaches the Watford Road. The defendants argue that the concluding words of the grant shew conclusively that it was dealing with something which might become a nuisance to the vendor or his tenants, and contend that the only possible subject-matter contemplated was the effluent. I do not think this necessarily follows; it may be that the grantor intended to discriminate between the discharge of any surface water conveyed to the farm and effluent resulting from sewage dealt with thereon, and limited the grant to "the passage and running of water" with that very object, or it may be that the grant was inserted only to exclude any possible claim for compensation in respect of the discharge of surface water; but whatever be the circumstances in or the object for which the grant came to be inserted, I

cannot construe it as the defendants claim it ought to be construed. The grant is limited to the passage and running of water, and the experts on both sides are unanimous that it would be quite impossible to describe the effluent as water. The argument on the proviso as to not creating a nuisance overlooks how injurious the collection of a body of even the purest water might be to the estate of the grantor, and how accurately a condition of things resulting in such a collection is described as a nuisance.

In my opinion, therefore, there is neither implied nor express grant of the right to discharge the effluent on to the plaintiffs' land, and the defendants if they are to succeed on this part of the case must do so under their statutory powers. These are to be found in ss. 16 and 17 of the Public Health Act, 1875. It is true that s. 17 is restrictive in its terms, but, read in conjunction with s. 16, s. 17 shews that the powers conferred by s. 16 include a power to discharge sewage effluent into a natural stream or watercourse.

The channel into which the effluent is in fact discharged by the defendants is the channel into which the surface water from the rising ground on each side of it finds its way, and by which it is carried off. The channel is fed by surface water alone, and when this has run off it is dry until further rainfall renews the supply. The defendants' case is that with these characteristics the channel is either a natural stream or watercourse or a sewer within the sections I have referred to.

In my opinion it is neither one nor the other. It is certainly not a natural stream, and although in one sense no doubt every channel along which water flows may be said to be a watercourse, and every channel which by location and surroundings is the inevitable collector and conductor of surface water from any particular area may fairly be said to be a natural watercourse, this channel is not in my opinion a natural watercourse within the Act. Sect. 17 deals with a stream, watercourse, canal, pond, or lake, and is directed to the maintenance of the standard of purity of the water in such stream, watercourse, canal, pond, or lake; it contemplates, I think, something in which water is for practical purposes constantly present and not a mere shallow

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depression such as I am here dealing with along which there is no constant flow of water, but which is alternately, in dry weather, a carrier of drainage effluent only, and in wet weather of a mixture of drainage effluent and surface water.

From what I have just said it will be gathered that the channel is a sewer within the definition of s. 4 of the Act, and prima facie it is vested in the defendants as the local authority within whose district it is situate. If it is so vested in them, then the defendants are justified in using it for the conveyance of the effluent, but if it is not so vested, then the plaintiff is entitled to call upon them to discontinue such user. The question, therefore, whether this sewer is vested in the defendants is the one with which I now have to deal. I am satisfied from the evidence adduced at the trial and from my own examination that it falls within the first of the three classes of excepted sewers enumerated in s. 13 of the Act and is not therefore vested in the defendants under that section. It is nothing but an agricultural ditch made by the landowner for the sole purpose of draining his land or removing from it superfluous water—made, that is to say, for the more profitable use of the land and made, therefore, by a person for his own profit. Some point was sought to be made of the fact that its course follows the line along which the natural drainage of the catchment area travels, and it was suggested that this consideration fixed upon it characteristics which suffice to remove it from the exceptions. But there is no substance in this submission; the course which the ditch follows is the obvious and natural one to be adopted by a landowner desirous of making it as effective as possible for the purposes for which it is made, that is to say, the carrying off of water from his land. All the facts bring this part of the case entirely within the decision of the Court of Appeal in *Sykes* v. *Sowerby Urban Council* (1), and the defendants have, in my opinion, wholly failed to establish any right or title to discharge their effluent into the plaintiffs' ditch.

Accordingly the plaintiffs are entitled to an injunction to restrain the defendants from causing or permitting any sewage effluent or sewage to flow or be discharged from their sewage

(1) [1900] 1 Q. B. 584.

farm, or any part thereof, into the ditch or sewer belonging to the plaintiff Phillimore delineated on the plan delivered with the plaintiffs' particulars in the action and thereon coloured blue.

As I stated in the earlier part of my judgment, I am satisfied that there has been in addition to the discharge into the ditch some underground flow of sewage from the farm on to the plaintiffs' land, but for reasons which I will state in a moment I do not frame the injunction so as to extend to this. Nor do I at this stage grant any relief by way of injunction in respect of the alleged nuisance by smell, but I award the plaintiffs 40*s.* damages in respect of each of these causes of action, and I give them liberty to apply in respect thereof for any injunction they may think themselves entitled to.

I adopt this course for several reasons. In the first place, although I am satisfied on the evidence that the plaintiffs have established a good cause of action on both these heads, I do not think any substantial damage has yet accrued to either of them therefrom. In the next place, I cannot disregard the difficulties with which the defendants have had to contend—difficulties greatly aggravated by exceptional climatic conditions, an extraordinarily dry season followed by an abnormally wet one, conditions almost certain to result in waterlogging and its attendant evils of leakage and smell. Thirdly, I think that although there have been offensive smells they have been intermittent and not continuous; and fourthly, I cannot fail to appreciate that the injunction which I am granting, and the operation of which I propose to suspend for six months, will involve something like a reconstruction of the whole system, and in such reconstruction I have no doubt care will be exercised to avoid as far as possible any escape of sewage or smell such as has given cause for complaint in these proceedings.

There remains the question of costs. Counsel for the defendants argued strenuously that the action was launched originally on a mistaken view of the law and with the object of obtaining relief of a different nature from that asked for at the trial. Whatever foundation there may have been for this suggestion—and I am not denying the fact that the correspondence before action dealt with matters of which I have heard

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nothing at the trial—I think the course which events took at the trial effectively disposes of the argument founded thereon, that the plaintiffs ought not to recover their costs from the defendants. At the trial it was found that neither side had framed its case exactly as the parties would wish to have done, and accordingly I have allowed both sides freely to amend, so that all matters in dispute might be raised, discussed, and adjudicated upon. This has now been done, and in the circumstances the costs must follow the event, and the defendants must pay them.

Solicitors: *Burgoynes & Co.; E. W. Reeves, for Sedgwick, Turner, Sworder & Wilson, Watford.*

G. M.

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June 12, 13, 16, 20.

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[1912 H. 702.]

Local Government — Injunction—Building in Street — Old Lane—Building Line for whole Street—Prescribing—Rebuilding—Notice—Compensation —Payment or Tender—Refusal to set back—Mandatory Injunction to pull down—Public Health Act, 1875 (38 *&* 39 *Vict. c.* 55), *s.* 155.

Action based on s. 155 of the Public Health Act, 1875, for an injunction to compel the defendant to remove a building completed before writ issued.

The defendant owned a house in a street and, being desirous of pulling it down and rebuilding it on the same site, duly deposited plans with the local authority. The latter thereupon adopted a plan shewing a building line for the whole of the street which cut a considerable slice off the site of the defendant's house. This plan did not refer expressly to the house. The authority further resolved that his deposited plan "be not approved" and wrote to him to that effect. Correspondence ensued; the defendant insisted on rebuilding on the site of the old house, and completed the new building. The authority did not give him notice under which section of the Act they were proceeding or make any tender of compensation; but they commenced this action for a mandatory injunction to compel the defendant to pull down so much of the structure as was in advance of the building line. By their statement of claim they alleged that they had at all times been and now were ready to pay compensation:—

Held, reversing the decision of Joyce J., that a building line had been duly prescribed and that the fact that it purported to refer to the whole

of the street in general terms was immaterial; that it was not necessary to give notice, and that in fact the defendant's advisers knew, under which section the proceedings were taken; that tender of compensation was not a condition precedent to enforcing compliance with the building line, and, if it was, the defendant by his hostile attitude had waived the objection; that the dispute was trivial, but the defendant had challenged the local authority and could not be allowed to avoid compliance with the building line; and that a mandatory injunction must be granted.

APPEAL from a decision of Joyce J.

This was an action based upon s. 155 of the Public Health Act, 1875 (1), for an injunction to compel the defendant to remove a building, completed a considerable time before writ issued.

The relators were the urban authority for the administration of the Public Health Acts of the urban district of Lye and Wollescote in Worcestershire. The defendant was the owner of a house No. 2 in an old street called Perrin's Lane, Wollescote, in the relators' district.

On January 19, 1912, the defendant, being desirous of pulling down and rebuilding his house on the same foundations, deposited a plan with the relators for their approval, shewing particulars of the proposed rebuilding.

The council appointed a sub-committee to prescribe a building line in Perrin's Lane and to confer thereon with Mr. H. E. Folkes, their surveyor. On February 5, 1912, at a meeting of the council Mr. Folkes presented a plan shewing the proposed building line and street line in Perrin's Lane and another road called Belmont Road, and a resolution was passed "That the building line and street line shown on the plan be prescribed and

(1) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 155:

"When any house or building situated in any street in an urban district, or the front thereof, has been taken down, in order to be rebuilt or altered, the urban authority may prescribe the line in which any house or building, or the front thereof, to be built or rebuilt in the same situation shall be erected, and such house or building, or the front thereof, shall be erected in accordance therewith.

"The urban authority shall pay or tender compensation to the owner or other person immediately interested in such house or building for any loss or damage he may sustain in consequence of his house or building being set back or forward, the amount of such compensation, in case of dispute, to be settled by arbitration in manner provided by this Act."

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adopted by the council and that such plan be signed by the chairman" (which was done). It was also resolved that Mr. Parish's plan should not be approved, on the ground that the proposed building was not in accordance with the building line prescribed by the council and did not comply with several of the council's by-laws; and that the clerk be instructed to write to Mr. Parish's architect to that effect. Mr. Folkes' plan shewed Perrin's Lane with an irregular outline and several houses scattered along the sides of it at various distances from the centre of the roadway, with a blue line called "street line" marked along the whole length of the lane outside, and containing a much wider space than, the present lane; and about six feet beyond the "street line" a red line called "building line" which cut off a considerable slice from the front of Mr. Parish's house. The adjoining houses had not been pulled down.

On February 15 the council's clerk wrote communicating to the defendant the council's disapproval of his plan. On February 24 the defendant's architect wrote to the council that the defendant would build in conformity with the by-laws but could not agree to the street and building lines shewn on the council's plan. On February 25 the defendant began to rebuild. On February 26 the council's clerk wrote to the defendant's architect that he was surprised that the defendant "will not agree to build in accordance with the prescribed building line." On March 12, the building being then five feet high, the council's surveyor wrote to the defendant that he was sorry to find the erection of the house was being proceeded with, and "I must therefore give you formal notice not to proceed with the work." The next day, i.e., on March 13, the parties met at the council's office, when the defendant's solicitor claimed compensation, apparently on general principles, and the council's clerk intimated the opinion that he was not entitled to any.

On March 18, at a meeting of the council, the surveyor reported that Mr. Parish was proceeding with the erection of the house and that he had given Mr. Parish's architect notice not to proceed with the work. The letter of February 24 was read, and the clerk also reported an interview with Mr. Parish's solicitor and a letter from the latter to the same effect. The council thereupon

resolved to take proceedings to compel Mr. Parish to conform to the by-laws. The council had not taken nor contemplated taking proceedings under s. 154 of the Public Health Act, 1875, to widen Perrin's Lane, which would have involved purchasing and paying for land taken, and did not during these negotiations give notice to Mr. Parish of the section of the Public Health Act under which they were proceeding, or make any offer of compensation. On April 27 the rebuilding was completed at a cost, as stated at the Bar, of about 200*l.*

On May 20 this action was commenced for a mandatory injunction commanding the defendant to pull down so much of the structure of his house as was in advance of the building line. The statement of claim alleged that the plaintiffs had at all times been and now were ready to pay compensation under s. 155.

Joyce J. dismissed the action with costs, and the council appealed.

Younger, *K.C.*, and *J. B. Matthews*, for the appellants. The point on which Joyce J. was uncertain was whether the tender of compensation should be made at the time when the notice to set back the building is given, and the learned judge decided the case against the appellants on other grounds. Sect. 155 of the Public Health Act, 1875, is in two separate and distinct parts. The first part gives the urban authority power to prescribe the building line where a building has been taken down in order to be rebuilt; and the second part of the section says that the authority shall pay or tender compensation to the owner for any loss or damage that he may sustain in consequence of his building being set back or forward, the amount of compensation to be settled by arbitration. Inasmuch as the compensation can be much more easily ascertained after the work has been done the Court will not put a contrary construction upon the Act: *Lister* v. *Lobley*. (1) It is often impossible to assess the compensation before the work is done. No injury is suffered by the building owner, the authority being bound to compensate him. The provision for compensation is quite distinct.

In *Masters* v. *Pontypool Local Government Board* (2) Fry J.

(1) (1837) 7 Ad. & E. 124. (2) (1878) 9 Ch. D. 677, 683.

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said that he did not go the length of saying that the tender of compensation must be made at the same time when s. 155 is put into operation.

The appellants in this case have not acted unreasonably: *Sutton Local Board* v. *Hoare*. (1) There is no equity to prevent them from exercising their powers under s. 155 on the ground of having misled the respondent: *Newhaven Local Board* v. *Newhaven School Board*. (2)

An injunction will be granted at the suit of the Attorney-General on behalf of the public to restrain the infringement of the building line, and in a proper case a mandatory order to pull down will be made: *Attorney-General* v. *Wimbledon House Estate Co*. (3)

Hughes, K.C., and *W. Mackenzie*, for the respondent. There are two things in such a case as this which the urban authority are bound to do. (1.) They must make clear to the building owner under what provision they are acting and what they require him to do. (2.) They must pay or tender compensation at the time of giving notice, or at the latest before the building owner commences rebuilding. There must first be an offer of compensation, and then if that is not accepted there must be an arbitration. The appellants in this case never gave any formal notice under the Act, nor did they offer any compensation until they delivered their statement of claim. In *Masters* v. *Pontypool Local Government Board* (4) Fry J. seems to intimate that the offer of compensation is a condition precedent. The council might have bought this piece of land under s. 154, but they preferred not to do so; they are interfering with a private right of ownership, and s. 155 will be construed strictly against them. They were not, as alleged in the statement of claim, "at all times ready and willing" to pay compensation. The dictum of Fry J. in *Masters* v. *Pontypool Local Government Board* (5) is in our favour. Compensation ought to have been tendered, not necessarily when the line was prescribed, but before the new building was begun: *Attorney-General* v. *Hatch*. (6) See the form of notice

(1) (1894) 10 Times L. R. 586.
(2) (1885) 30 Ch. D. 350.
(3) [1904] 2 Ch. 34.
(4) 9 Ch. D. 677, 681.
(5) Ibid. 683.
(6) [1893] 3 Ch. 36.

requiring a house which has been taken down to be set back: Encyclopædia of Forms and Precedents, vol. xi. p. 94.

In fact no building line has been prescribed in compliance with s. 155. Such a line must be prescribed in regard to a particular house, and to that only. When another house comes down the authority may bear in mind the line already prescribed, but they cannot begin by prescribing a general line for the whole street and then refuse to sanction the rebuilding of a house because it is not being erected in accordance with that general line. The power to prescribe a building line at all only arises when a house has been pulled down, and there is no power to prescribe a general line for an old road like this. Further, the proceedings of the council were irregular. Sect. 155 does not provide for compensation for subsequently ascertained damage, but that may be recovered under s. 308. If a tender of compensation after the house is rebuilt is sufficient the second part of s. 155 is useless, although the intention was that wherever a building was set back the owner should be compensated. That is quite different from compensation under s. 308. On the language of s. 155 it is clear that compensation must be tendered when the house is required to be set back, before the new building is begun, and before the owner can be prevented from going on with his building. The words of the section are "in consequence of his house or building being set back," not "having been set back." Disputes as to the amount of compensation are to be referred to arbitration under s. 179. Previous notice is contemplated on the exercise of any of the powers of the Act; e.g., on the construction of sewers, s. 16 and s. 32, although the compensation in that case comes under s. 308; paving of private streets under s. 150: *Stourbridge Urban Council* v. *Butler and Grove* (1); *Rayner* v. *Stepney Corporation*. (2) A building line has to be prescribed and notice given before the house is pulled down and before the new one is commenced: *Folkestone Corporation* v. *Woodward*. (3)

At all events this is not a case for a mandatory injunction. The public cannot suffer any injury and the jurisdiction is

(1) [1909] 1 Ch. 87. (2) [1911] 2 Ch. 312.
(3) (1872) L. R. 15 Eq. 159.

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discretionary. The Attorney-General has no greater rights in this respect than other people: *Attorney-General* v. *Wimbledon House Estate Co.* (1); *Attorney-General* v. *Birmingham, Tame and Rea District Drainage Board* (2); *Attorney-General* v. *Grand Junction Canal Co.* (3) The matter is altogether too trivial for a mandatory injunction.

Younger, K.C., in reply.

Cur. adv. vult.

June 20. COZENS-HARDY M.R. This is an action by the Attorney-General on the relation of the Lye and Wollescote Urban District Council. It is founded upon s. 155 of the Public Health Act, 1875. I will read that section without for the moment commenting upon it. [His Lordship read it.] Now it is alleged by the relators that a building line was prescribed. That is challenged by the defendant. The defendant also says that no notice was given to him of the section under which action was taken by the urban district council; that no tender or payment of compensation was made, and that that is a condition precedent. The defendant also alleges that the relators were not always ready and willing to pay compensation, and that the case is trivial and unimportant; that no public benefit is involved, and that no relief by mandatory injunction ought to be given. Those are really the points which have been argued before us.

Now the first point is, Was any building line prescribed? If there was not, there is an end of the whole action. That depends upon some correspondence and upon the minutes of the urban district council. [His Lordship read the correspondence and minutes.] It seems to me impossible for us to say that there was not a building line prescribed for Mr. Parish's property which had been pulled down and was being rebuilt. It was none the less the building line prescribed for No. 2, because on the face of the plan it did that which was, I must say, a very silly thing to do, namely, put a building line right along Perrin's Lane and also along Belmont Road, a thing which could have no operation at all as in any way binding the urban district

(1) [1904] 2 Ch. 34. (2) [1910] 1 Ch. 48.
(3) [1909] 2 Ch. 505.

council. It could only have the effect of an indication of what was, at the moment, their idea of where, in case of another house being pulled down, it might be reasonable they should, in the exercise of their discretion, apply s. 155. But I come to the conclusion that there was a building line prescribed, in the language of s. 155, which fixed "the line in which any house or building, or the front thereof, to be built or rebuilt in the same situation shall be erected."

The next point is that the urban district council did not tell Mr. Parish whether they were proceeding under s. 155 or not. There was no necessity for their doing so. It seems to me that it was quite unnecessary for them to say under which section of the Act they were proceeding. They did not purport to offer to buy under s. 154; they only purported to prescribe the building line, which is the very language used in s. 155, and I can see no ground for saying that in a case of this kind the whole proceedings must be void unless the building owner is informed that the authority are proceeding under s. 155 and not under s. 154.

Then there is the more serious point that there was no tender or payment of compensation, which is said to be a condition precedent. The language of the section, after positively imposing an obligation upon the building owner not to build in front of the building line when he is rebuilding, goes on in the second part of the section to say: "The urban authority shall pay or tender compensation to the owner or other person immediately interested in such house or building for any loss or damage he may sustain in consequence of his house or building being set back or forward, the amount of such compensation, in case of dispute, to be settled by arbitration in manner provided by this Act." Now it is said that that is a condition precedent to the whole operation of the section. The council must either tender or pay before they can take any effective action or impose any obligation upon the defendant. But a condition precedent to what? At what date must compensation be tendered or paid? That is a question to which no answer has been given, and I can find no necessity in the language, and certainly no overpowering necessity on the ground of convenience, for saying that the compensation must be tendered before some particular date. I think it is quite

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sufficient if the urban authority do that which is, by this section, made an obligation upon them, namely, pay or tender compensation for any loss which the owner may sustain in consequence of the house being set forward or back and so on. No doubt the word "tender" does create, at first blush, some difficulty, but I think, remembering that this is a consolidation Act, it is legitimate to observe that this part of s. 155, and, indeed, more or less the whole section, is a relic from a former Act, an Act which is repealed in the schedule; it is plainly a relic from s. 35 of the Local Government Act, 1858. There is one difference and a not unimportant difference between that section and the present. In that section compensation was to be paid, to be ascertained in accordance with the Lands Clauses Act. As we all probably remember, under the Lands Clauses Act there is a provision for offering or paying compensation, and when there is a reference under that Act, the question whether the authority exercising the powers has tendered enough is of vital importance in considering the question of costs. I am far from saying in the present case that, although there is no obligation on the arbitrator under this Act to say that the authority should get the costs where the amount tendered was held to be sufficient, yet I think it was plainly within the competence of the arbitrator, who had a discretion in the matter, to say "It is right to say that, before the matter came into my hands to decide, the authority had made a tender, which tender I hold to be sufficient." I therefore think that there is nothing in this section which really supports the idea that tender is necessary, or even payment is necessary, before the step can be taken by the local authority.

There is another point which it is not necessary to elaborate. I will only say that I have grave doubt whether the absolutely hostile attitude taken up by the defendant in the case does not amount to a waiver of any objection on this point, but I prefer to say that the payment or tender of compensation are not conditions precedent.

Then it is said, the relators were not always ready to pay the compensation. There is no doubt, I think, that both parties have taken a wrong and altogether unreasonable and almost absurd view. I do not draw any distinction as regards the blame

between the parties. So far as it is of any importance it extends to one as much as to the other. Mr. Parish said they had no rights at all, and took a view which I have not been able to appreciate, and which has not been attempted to be supported by argument in the present case. On the other hand, the urban district council said some very foolish things, and made very foolish objections in the course of the correspondence which has been read. But there never was any demand for compensation by Mr. Parish which was refused by the urban authority. When the action was commenced, in the statement of claim they, in terms, perfectly clearly expressed that they would pay compensation in accordance with the Act. That being so, I think that there has been no evidence of refusal to pay what may be legally due, and that the offer having been made in the statement of claim, that is quite sufficient.

It may be not unimportant to observe that when that offer was made the defendant seems to have thought he had got the other side in a difficulty and said, Do not you think you had better purchase now? The local authority are not proceeding under the purchasing section at all; they are proceeding under s. 155, which is not the purchasing section, which will not vest any soil or land in the urban district council, but merely imposes a fetter upon the building on a portion of the defendant's property in respect of which fetter or restriction compensation can be claimed, and, if claimed, must be paid.

The only other point to which I need refer is that it is said that it is a trivial and unimportant case in which there is no public benefit, and that no relief by way of mandatory injunction ought to be given. I agree that it is a trivial and unimportant case. It is not very easy to conceive what public benefit is likely to be gained by fixing the building line for these small houses, particularly for the whole length of the street, where there are very few points at which s. 155 can be made operative, because there are only four or five other houses which can be pulled down and rebuilt. But that, after all, is not for us to determine. It is not suggested that the district authority acted in bad faith. It is not suggested that, by their conduct, they induced the defendant to do that which he did, namely, go on to build, notwithstanding

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the notice; or induced him to go on on the ground that they did not intend to enforce it, or anything of that kind. There is, if I may use such a phrase, no personal disability affecting them as regards the defendant. I think it is a case in which the local authority was entitled to prescribe the building line. It is not for us to say whether, in our view, it was a reasonable thing that they should have prescribed this building line. I disclaim any right whatever to consider that in a case where good faith is not impugned. I think, therefore, that when the defendant does, as he did here, absolutely challenge the authority, denying their right to do what they did, we ought not to allow him, if in the wrong, as I think he was, to escape from the consequences of that wrong.

Now as to the remedy. It is quite plain that no remedy is possible except an injunction; no damages can be claimed because it is not a case in which the urban district council have any claim: they could not recover one farthing of damages. A declaration would be perfectly idle because the house has been built up, built up with full notice. There was no laches. There was no mistake induced by the action of the authority.

Joyce J. dismissed the action. I am not quite sure that I appreciate on what ground precisely he arrived at that conclusion, but he seems to have thought that the authority had behaved badly. To some extent I share that view. It cannot be right to dismiss the action with costs in a case where the plaintiffs are seeking to enforce the duties and rights which are imposed and conferred upon them by s. 155. I think, therefore, that a mandatory injunction must be granted. But, having regard to the conduct of the authority, whose ignorance and blunders, to a large extent, occasioned the difficulty, I think there should be no costs of the action in the Court below. The defendant must pay the costs of the appeal.

KENNEDY L.J. In this case I agree there is some difficulty. The difficulty arises on the different constructions of s. 155 of the Public Health Act for which argument may be adduced. Complications have arisen partly from that which in my view was certainly a want of the degree of precision and of businesslike

conduct on the part of the urban authority which one has a right to expect, and also partly from the obstinacy of the owner of the house in question, in persisting in beginning to build and in building the house in question contrary to the express notice which he had received, and not waiting until the question might be settled in the way in which, according to my view, both the statute intended and reasonable conduct would have dictated to him. The section in question, s. 155, has been read by the Master of the Rolls, and therefore I shall not take up time by reading it again. The construction which is insisted upon by the urban authority is that in the event which is mentioned in the early words of the section, "When any house or building situated in any street in an urban district, or the front thereof, has been taken down, in order to be rebuilt or altered," and when, in accordance with the words which follow,—"the urban authority may prescribe the line in which any house or building, or the front thereof, to be built or rebuilt in the same situation shall be erected"—it has been so prescribed, then that which has been prescribed must be obeyed, and that it is an independent though equally obligatory enactment of the section that "The urban authority shall pay or tender compensation to the owner or other person immediately interested in such house or building for any loss or damage he may sustain" in consequence of obeying the order of the local authority. The defendant says that that is not the true meaning. He insists here, as his counsel insisted in the Court below, that the urban authority must prescribe in a particular way. It must, as he contends, in or with its order or prescription, make the statement that it is the line of his particular house or building, and must also inform the person to whom the order is addressed that it is an order made under s. 155 of the Public Health Act, 1875, and also in terms inform the person to whom the notice is addressed that the urban authority are willing to pay some sum of money by way of compensation. As between those two different views, it being admitted that in this case a resolution was passed for the building line and a notice which was a communication of that resolution was given to the defendant, I think myself that the construction put forward by the plaintiff is right. I do not think that it was a condition precedent to the validity of the

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proceedings of the urban authority that the notice to the defendant should specify the section or specify a building line only for the particular house in terms, provided always that it is made clear that it was in reference to that house that the building line was then sought to be made compulsory. Nor do I think it necessary that there should be an offer of compensation in the document conveying the notice. There is nothing in the section, and nothing in this Act or any other Act which has been pointed out to us by the counsel for the defendant, which makes obligatory any particular form of resolution, and upon the facts I have no doubt that it was sufficiently stated to the owner that it was a case in which they were prescribing the building line for the house or building which he was intending to erect in the same situation on which he had previously pulled down the old building. No other section can be suggested as one with which the recipient of the notice could possibly confuse the notice that had been sent to him. Sect. 154 is a section empowering the authority to purchase. There was no question of purchase at all ever conveyed in any shape or form orally or otherwise to the owner, and it is clear on the correspondence that the representative of the owner perfectly well understood that the resolution and the notice of it which had been conveyed were a resolution and a notice which related to the prescription of a building line for the house which the owner was intending to erect. That is plain on the correspondence.

The question of stating whether compensation will be paid or not is a different question, and as to that an argument has been addressed to us, on the strength to a large extent of the addition of the words "shall pay or tender," that there ought to be a tender of compensation or of payment of compensation as a preliminary to some step, although I am still at a loss to know at what stage it is said the payment or tender must be made. What is to be preliminary to the exercise of the right of the local authority? Is the tender to be embodied in the resolution? Is it to be embodied in the notice of the resolution to the owner, or is it to be a condition precedent to the right to enforce the law in the way which the local authority is here seeking to enforce it so as to vindicate their exercise of the right? No answer has

really been given to any of these questions, and when I look at the judgment of the learned judge in the Court below I say with sincere respect that I am not sure what view the learned judge intended to take. He has said that in his opinion it was a natural and rational thing to tender compensation at the same time that notice was given that the building line had been prescribed. But that statement is guarded by the accompanying statement that he did not intend thereby to lay down any general rule. Then again with regard to prescription of a building line, whether what was done was sufficient—in other words, to be treated as an act coming within s. 155—the learned judge says it is doubtful whether a building line had been properly prescribed, or, if it had, whether the defendant had received the proper notice before the rebuilding was commenced. He says that at any rate there ought to be in the notice an offer of compensation before the building is ordered to be pulled down. I am not, therefore, quite sure what the learned judge intended to be taken as his view of the law on the section with regard to the sufficiency of the resolution, the sufficiency of the notice, or the duty to pay or to tender compensation. In my view, although I agree with him that no reliance can be placed by the plaintiffs upon the case of *Lister* v. *Lobley* (1), it seems to me that the urban authority has a distinct but an independent duty to pay or to tender compensation. The paragraphs stating what they can do and the paragraphs stating what they must pay are distinct and separate paragraphs. There is no doubt that if the resolution was sufficient and the notice was sufficient and had been, as it ought to have been, at once accepted by the building owner, as a person intending to obey, as he must obey, s. 155, he could at once have asked for the compensation ; and in default of the grant of compensation he would have been entitled to claim an arbitration to settle the amount which was in dispute.

That being the position of things, what was done? The dates have been summarized by the Master of the Rolls, but I would just say this: it is quite clear, first of all, that on the report of their surveyor a resolution was passed, some time before any building had been begun, by the urban authority, prescribing a

(1) 7 Ad. & E. 124.

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building line for the house of the defendant. Of course, in so far as any plan shewed an extension of that building line to other houses, it had no effect at all. But it was none the less a building line for his house, as was clearly indicated on the plan, because it may have indicated to him what would happen if other houses were pulled down and intended to be rebuilt upon the situation in which they had previously stood. It was a good and clear notice with regard to his house, and that is a compliance with the statute in law as well as in common sense. That was communicated by the authority to this gentleman's representative as early as February 15, 1912, ten, if not eleven, days before any rebuilding operations were commenced. It was pointed out to him that, while there was also an objection on the ground of non-compliance with certain by-laws, "The proposed new building is not in accordance with the building line prescribed by the council. The plan showing the building line prescribed by the council may be inspected by you at any time at my office"; and it further appears from the correspondence, to prevent any mistake, that that plan bore in the colour red the building of the defendant, so that he saw the building line applied to his house, and he knew that that building line had been prescribed by the council, who are by s. 155 the persons to prescribe. On February 24, that is nine days after notice had been effectually given to him, his representative advises the clerk of the local authority in writing, not that I do not understand your plan, not that you have not offered me compensation, not that I claim compensation, but in these terms: "Mr. Parish has instructed me to inform you that the house will be built in conformity with the by-laws, but he cannot agree to the street and building lines shown on the plan that you have recently had prepared." The street line of course was immaterial, that was merely shewing upon the plan what in the future the council thought would be a good line for their street. The immediate matter was the building line. In reply to that letter the clerk very naturally wrote: "I am surprised that you should intimate that Mr. Parish will not agree to build in accordance with the prescribed building line. From your many years' experience, you know the responsibility attaching to a

person who builds contrary to a prescribed building line, and I therefore think that you should at once see your client and advise him accordingly, before the work is commenced, and so avoid unpleasantness." On February 25 Mr. Parish, having had nine days to consider the matter, determined to defy the local authority, and began his building. A further notice was given later on, but the important thing is that before he began to rebuild he had a valid notice of a valid resolution, and he determined not to comply with it. I am not going into the early discussions which seem to have taken place with more or less regularity. I do not think anything really turns upon them, but at a later date one of the officials of the local authority said that he did not think any compensation was due or ought to be paid. I do not think that that matters. I do not think that any informal conversations of that sort would in any way bind the council, nor were they intended to do so. There seem to have been discussions of the comparative financial prosperity of the urban authority and the very poor salary it paid to its clerk. That kind of thing shews the class of conversation which had taken place, which seems to me to be entirely immaterial. It is not as if Mr. Parish had been in any way at any stage misled, because long before that conversation, and, as I have said, as early as February 15, he had had clear notice of what the council meant to do. His representative had himself written on March 13 to the defendant as to the building line: "The building line according to their books was passed on the 5th February, 1912. This was before you started to build and the cases go to show that under the circumstances the council could enforce that building line." And so far from not understanding s. 155, the section in question, that very gentleman writes: "Under the Act of Parliament the urban authority will have to pay or tender you compensation for the loss or damage you may sustain in consequence of the house being set back"; a quotation from this very section, as to which it is suggested there was some uncertainty in the notice or in the resolution which preceded it.

For these reasons, it appears to me that there has been a breach of the duty which was imposed by the statute, and I

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cannot see that there was any laches on the part of the urban authority. They had to communicate with the Attorney-General before he could sue as plaintiff in this action, and there is no suggestion of bad faith on their part. It appears to me that we are not a Court of Appeal from the wisdom or unwisdom of the step which, under s. 155, has been taken by the urban authority on their own responsibility as a public body. It is quite immaterial to consider whether it was more or less beneficial to the public that this setting back should take place. The compensation is to be paid, and it could have been claimed and, I suppose, settled long ago, and it could be settled just as well after the order had been obeyed, for the space which is lost by the setting back, as it could be assessed at the time of the notice; indeed, in many ways it is to the advantage of the owner, if he has to go to arbitration, that he should, by considering what he has lost and by putting his case properly, have an opportunity of fully considering what the loss is; he will know all the more if he has obeyed the council by leaving the ground unoccupied by any building. The decision of the Court below seems to have been influenced, I think, by the consideration of what appears to the learned judge, possibly rightly, to have been a small matter or a doubtful matter of public advantage. I do not think that that is a question which we have got to consider in deciding this appeal. If, on the other hand, the decision of the Court below is that there was some defect in the resolution which was passed and the notice which was given, I, with respect, think there was none. If, on the other hand, it is grounded either wholly or in part upon the absence of an offer of compensation, I see nothing, as I have said, in the section which prescribes the time at which such urban authority is to pay or tender compensation. I do not quite understand the phrase "order the building to be pulled down," because there is no such order, but in so far as it is an application to enforce by injunction the rights of a public body, as in this case, it is, as my Lord has pointed out, stated in the statement of claim, asking the Court to make effectual those rights under the statute, that the urban authority is willing to pay compensation, and that compensation can be assessed now just as well as at any time. Whether

the words "pay or tender" are to be explained in the way, as I should agree is probable, which my Lord has stated, or not, or whether, perhaps, the words come in per incuriam, there is certainly nothing in the form of the sentence to make the validity of the resolution or the notice dependent upon a contemporary or a previous offer of compensation.

I think, therefore, that the judgment must be for the appellants; I also agree that the question of costs should be dealt with in the way stated by my Lord. This case eminently shews the importance of greater precision and more businesslike treatment of a matter of this kind by the urban authority, while it also to my mind illustrates the folly, when he had full notice of a claim, of a man deliberately incurring the expense of building after he knew that, rightly or wrongly, a claim was made, which, if it was right, as his own representative advised him, was a claim which would involve the consequences that are involved in our judgment, namely, his being enjoined from maintaining in its present position the building which he has chosen unwisely to erect.

SWINFEN EADY L.J. I am of the same opinion, and I only propose to add a few words on the two main contentions of the defendant. These were, first, that the local authority had exceeded their powers by prescribing a general building line which they had no power to do, and had not proceeded under s. 155 to prescribe a line in which the front of the defendant's house had to be built; and secondly that they must pay or tender compensation as soon as the building owner has notice of the prescribed building line, or at the latest before he begins to rebuild. Now when the facts are looked at it is quite clear that the council proceeded under s. 155 and did prescribe under that section the line in which the building owner's house was to be erected. The matter began, not with the consideration of any general building line, but with the submission of plans by the defendant for the new house, and it was with reference to the plans presented by him for the erection of a house in Perrin's Lane that it was resolved "That a subcommittee be appointed to prescribe the building line in Perrin's Lane and to confer thereon with Mr. H. E. Folkes," Mr. Folkes

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being the surveyor who was temporarily acting for the council. The next thing that happened was that this sub-committee with Mr. Folkes met on the spot in Perrin's Lane. Mr. Folkes presented a report of exactly what had occurred, and this report was read at the next meeting of the council. "Mr. Folkes reported that he met the committee at Perrin's Lane on the question of fixing a building line for a proposed house for Mr. T. Parish for which plans have been deposited." Then he reported: "By continuing the line of the new wall erected adjoining against the street to Mr. Pardoe's property it was found that the other side of a 12 yard road would be about 6 ft. 6 in. inside the street line shown on the block plan deposited. There should be a building line behind the street line to agree with the other new houses erected in Perrin's Lane. This will necessitate setting back the proposed house some considerable distance from the line shown on the plan deposited. I should advise that a plan of this portion of the road be prepared and deposited with your clerk so that, after the building line has been fixed by resolution by you, notice could be given to Mr. Parish's architect to inspect." That report came before the council on February 5; the building line was prescribed, and then the next entry is: "The plans for the new buildings of Thomas Parish, Mr. Folkes having presented his report on the plans deposited by Thomas Parish for the erection of a house in Perrin's Lane"—that is the report to which I have just referred—"it was resolved that the plans deposited by Mr. Parish be not approved by the council on the ground that the proposed building is not in accordance with the building line prescribed by the council." To my mind it is clear that the council considered the building line with reference to the defendant's house, and the plan signed by the chairman prescribed the line in which the front of the defendant's new house was to be built. True it is that this plan also gave additional information. It shewed the line which the council apparently hoped the widened street would eventually take, and it also shewed a building line along Perrin's Lane which might ultimately, as houses were rebuilt, be secured. The council only purported to affect the defendant by fixing a building line for the new house for which he had already submitted the new plans

This they had power to do under s. 155. With regard to the second point, although s. 155 imposed on the council the obligation of paying or tendering compensation for any loss or damage sustained, there is nothing in the section requiring such payment or tender as a condition precedent to the council enforcing the building line. It was contended that payment or tender must be made when notice of the building line prescribed is given to the building owner, or, at latest, before the building owner has commenced rebuilding. But there is nothing in the section to justify this contention. The building owner is under a positive obligation to erect his building in accordance with the building line, and the local authority is under a positive obligation to pay or tender compensation, which obligation may be enforced by proper legal proceedings, but these are separate independent obligations.

In my opinion, neither the convenience of the case nor the fair meaning of the words requires such a construction as the defendant contended for. It was further insisted that the local authority had not made it sufficiently clear to the defendant under what power they were acting. I think the correspondence shews that the defendant quite clearly understood the power under which they were acting. No particular form of notice is prescribed for use under s. 155, and the defendant on appeal expressly stated that he did not claim any equity to prevent the council from exercising their power under s. 155 on the ground that they had misled him. In my opinion, the correspondence shews that the defendant intended to build in defiance of the building line for his house which he knew had been settled, and by his letter of March 21 he made it quite clear. He said "There is a clear issue to fight"; and that issue was the building line, and on that issue he has failed.

For the reasons which the Master of the Rolls has given I concur in the form of order which has been proposed.

Solicitors: *Lees & Co., for W. S. Mobberley, Lye; Church, Rendell, Bird & Co., for C. Herbert Collis, Stourbridge.*

H. C. R.

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1913

NEVILLE J.
June 6.

C. A.
June 30.

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[1912 T. 938.]

Local Government—Alleged Right of Way—Action by Landowner for Trespass—Resolution of District Council to defend Action—District Council added as Defendants—Pleadings—"Neither claim nor deny"—Motion to strike out Defence of District Council as embarrassing—Rules of the Supreme Court, Order XIX., r. 27—Local Government Act, 1894 (56 & 57 *Vict. c.* 73), *s.* 26, *sub-ss.* 1, 3.

The plaintiff claimed a declaration of title and an injunction to restrain certain persons from trespassing on his lands, and they pleaded a public right of footway over his lands. The district council then passed a resolution under s. 3 of the Local Government Act, 1894, to defend the action. Thereupon the plaintiff added them as co-defendants and by his amended statement of claim alleged that they threatened and intended to exercise the alleged right of way. The district council, with the view of avoiding liability for the costs of the action, by their defence denied that they threatened or intended to exercise the right of way and pleaded that they neither asserted nor denied the existence of the right of way:—

Held by Neville J. and by the Court of Appeal, that this defence did not infringe any rule of pleading and was not embarrassing, and that the liability (if any) of the district council for costs would be determined at the trial of the action.

MOTION.

This was an application to strike out the defence of the defendants the Andover Rural District Council as embarrassing under these circumstances.

The plaintiff Thornhill was the owner of the Drayton Estate in the county of Southampton, and his co-plaintiff was the tenant in possession of part of the estate, and they claimed a declaration of title and an injunction against certain persons to restrain them from trespassing over and across their property in the assertion of an alleged right of way. The rural district council of Andover were subsequently added as defendants and, on motion by them that they might be struck out as defendants, they were retained as defendants and leave was given to the plaintiffs to amend their statement of claim: see *Thornhill* v. *Weeks*. (1)

The plaintiffs by their amended statement of claim alleged

(1) [1913] 1 Ch. 438.

(paragraph 4) that the defendants wrongfully claimed that there was a public right of way from and to the Andover High Road over and across the plaintiffs' property; and (paragraph 9) that the defendant council approved of the acts of the other defendants complained of and asserted that there was a right of way over the premises mentioned in paragraph 4, and had passed a resolution to defend the action, and threatened and intended by their servants to exercise the alleged right of way. The defendant council by paragraph 4 of their defence did not admit the allegations in paragraph 4 of the amended statement of claim, and "neither claim nor deny that the public right of footway which is claimed by their co-defendants in fact exists"; and by paragraph 7 of their defence admitted that acting in exercise of the power conferred on them by s. 26, sub-s. 3, of the Local Government Act, 1894, they duly passed the resolution mentioned in paragraph 9 of the amended statement of claim and that their clerk had taken the necessary steps to carry it into execution; save as aforesaid they did not admit any of the allegations in paragraph 9 and they denied that they threatened or intended to exercise by their servants or agents or otherwise the right of footway claimed by their co-defendants. The plaintiffs moved to strike out the defendant council's defence as embarrassing; alternatively, that they might be ordered to deliver a further and better statement of the nature of their defence.

The motion was heard before Neville J. on June 6, 1913.

Peterson, K.C., and *Whitmore Richards*, for the plaintiffs. The defendant council have adopted a course which is extremely embarrassing. In paragraph 4 of their defence they neither admit nor deny the right of way, and yet they are assisting their co-defendants with public money. Therefore they are defending the action on the footing that there is a public right of way. They are seeking to defend the action without being responsible for the costs. That is an impossible position. If they think there is no right of way they ought not to defend.

Austen-Cartmell, for the defendant council. I agree that the object of the council is to defend the action without being liable for costs if the plaintiffs succeed. The council are acting

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in discharge of their statutory duty under s. 26 of the Local Government Act, 1894, and are justified in assisting their co-defendants: *Rex* v. *Norfolk County Council.* (1) They are a public authority and have to protect the money of the ratepayers. The original defendants are persons in an humble position of life and the object of the plaintiffs is to obtain security for their costs by making the council the substantial defendants. The object of the council is not to embarrass the plaintiffs, but to protect the ratepayers' money against the plaintiffs' claim for costs; their defence only means that they neither assert nor deny the existence of the right of way and leave the plaintiffs to prove their case. The council deny that they threaten or intend to exercise the right of way or to do anything. They are only assisting their co-defendants with funds. If the Court at the trial should think the council are the substantial defendants, they can be ordered to pay the costs. No cases have been cited on behalf of the plaintiffs, and it is impossible to say that this defence is embarrassing or that it discloses no reasonable answer.

Peterson, K.C., in reply, referred to *Leckhampton Quarries Co.* v. *Ballinger.* (2)

NEVILLE J. This application raises a curious point of practice. The owner of an estate claims title to a piece of land and a forcible entry has been made on that land by some of the defendants claiming a right of footway across it. The owner and his tenant bring an action against them, and the rural district council of Andover intervene and are made defendants to the action, and it has been held by Swinfen Eady J. that they are rightly made defendants, at all events for the present so far as the pleadings are concerned. They intervened under s. 26 of the Local Government Act, 1894, which provides, sub-s. 3, that a district council may, for the purpose of carrying into effect this section, institute or defend any legal proceedings and generally take such steps as they may deem expedient. If they intervene in this manner it remains to be seen how the Court in the exercise of its discretion will deal with their costs. I am not deciding that question now. The original defendants here assert there is a

(1) [1901] 2 K. B. 268. (2) (1904) 20 Times L. R. 559.

right of way, and the rural district council, who act for the ratepayers, are defending the action and say that they are entitled to do that without admitting or asserting whether the right of way exists or not. As a matter of pleading I think they are entitled to do that. I think the district council are entitled to defend in this way and to leave the burden of proving the alleged right of way on the shoulders of those who assert that it exists. I do not think that such a pleading will lead to any embarrassment at the trial of the action. In the ordinary course it will be for the plaintiffs to prove their title and the defendants will then try to prove the right of way. If they succeed, then cadit quæstio, and their costs must be paid. But if the plaintiffs succeed in shewing that there is no right of way, the Court will then have to consider whether the position of the district council is one in which they ought or ought not to be ordered to pay the costs of the action. The plaintiffs may succeed in proving that the district council did threaten and intend to exercise the right of way or did assert that there was a public right of way, and in either of those cases the view that the Court takes of the evidence at the trial will decide whether the district council shall or shall not pay the plaintiffs' costs of the action. On the whole I do not think that the concluding words of paragraph 4 of the defence are an infraction of any rule of pleading. I am also of opinion that the district council are entitled to say "prove your case, and whether you do or do not prove your case we shall contend that we are not liable for any costs of the action"; but that is a point which the Court will decide at the trial. There will be no order on this motion except that the costs are costs in the action.

H. L. F.

The plaintiffs appealed. The appeal was heard on June 30, 1913.

P. O. Lawrence, K.C., and *Whitmore Richards*, for the appellants. The statement of defence is evasive and embarrassing. Paragraph 4 is inconsistent with paragraph 7. The position which the council take up leaves us doubtful as to their attitude because they admit that they have passed a resolution to defend the action

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[KENNEDY L.J. That is enough for you. If you get judgment that there is no public right of footway you will get a declaration to that effect and an injunction. On the question of costs they have said that they neither claim nor deny, but in paragraph 7 they admit that they did all the acts requisite to put them in the position of supporting the other defendants throughout the trial. If they had simply pleaded paragraph 7 that would have been perfectly good. I do not see how it embarrasses you.

SWINFEN EADY L.J. The judge at the trial will know the facts, including the passing of the resolution.

The rural council do not now recede from their previous position or admit the plaintiffs' allegation that there is not any public right of way.

If the plaintiffs succeed at the trial, there will be ample jurisdiction to order the rural council to pay the costs; and, if the plaintiffs fail, ample jurisdiction to order them to pay the costs of the rural council.

COZENS-HARDY M.R. I cannot see why you need trouble yourselves about this defence. With all respect to the pleader I am inclined to think that paragraph 4 is unintelligible. If you make out that there is no public right of way you will succeed in the action, and I cannot conceive any judge making a declaration in your favour and ordering you to pay the costs.

KENNEDY L.J. Any judge I should think would say "these people have passed this resolution and acted on it and brought the case to trial, and they must pay the costs if they are held to be wrong."]

If your Lordships express that opinion it will be sufficient for us, and we will say nothing more.

COZENS-HARDY M.R. Then the appeal will be dismissed with costs.

Jenkins, K.C., and *Austen-Cartmell*, for the council, were not called upon to argue.

Solicitors: *Indermaur & Brown, for W. R. Graham, Andover; Chapman-Walker & Shephard.*

H. C. R

LORD ASHBURTON *v.* PAPE.

C. A. 1913 *June* 30.

[1913 A. 712.]

Injunction—Documents—Privilege—Restraint of Publication—Documents improperly obtained—Secondary Evidence—Copies.

It is no answer to an action brought for an injunction to restrain publication of copies of privileged documents to say that the copies, although improperly obtained, will be wanted in pending proceedings to prove the contents of the original documents, which, owing to the privilege, cannot be produced.

P. was a bankrupt and his discharge was opposed by, amongst others, the plaintiff. P. obtained by a trick letters which had been written by the plaintiff to his solicitor and were therefore privileged. P. had these letters copied and proposed to use them in the bankruptcy proceedings as secondary evidence of the contents of the letters which, owing to privilege, he could not produce. The plaintiff brought an action for an injunction to restrain P. from disclosing the letters or the copies, and Neville J. made an order restraining him from doing so except in the bankruptcy proceedings:—

Held, that the fact that the copies, although improperly obtained, might be admissible as secondary evidence in the bankruptcy proceedings, was no answer to the action, and that the plaintiff was entitled to an absolute injunction without any exception.

Appeal from a decision of Neville J.

This was an action brought by Lord Ashburton against Edward James Pape, Charles William Langford, Thomas Howard Redfern, and William Nocton for an injunction "restraining the defendants and each of them from publishing, circulating, disclosing, divulging, or parting with, otherwise than to the plaintiff or by deposit in Court, and from allowing to be published, circulated, disclosed, or divulged any correspondence, letters or other documents received by or communicated to the defendant Nocton as solicitor of the plaintiff, or the effect thereof, or copies thereof, or extracts therefrom, and from informing any person or persons of their or any of their contents."

Mr. Pape was a bankrupt and his discharge was opposed by, amongst others, Lord Ashburton, who was a creditor for over 139,000*l*. In the course of those proceedings it appeared that

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Mr. Pape had in his possession a number of letters written by Lord Ashburton to his late solicitor, Mr. W. Nocton, which were admitted to be privileged. These letters had been obtained by Mr. Pape by serving on one of Mr. Nocton's clerks called Brooks a subpœna duces tecum requiring him to produce the letters in the Bankruptcy Court. Brooks did so, and whilst in attendance there complained of not feeling well, handed over the letters to Mr. Pape, and left the Court. Mr. Pape's solicitors, Messrs. Langford & Redfern, took copies of the letters and gave the originals back to Mr. Pape. Lord Ashburton's present solicitor heard of this and wrote to Messrs. Langford & Redfern for copies of the letters, and these, after an application in the Bankruptcy Court, were supplied to him. On a motion by Lord Ashburton in the action Neville J. made an order that the defendant Edward James Pape do forthwith hand over to the defendant William Nocton all original letters from the plaintiff to the said William Nocton or his firm in his the defendant Edward James Pape's possession or control. "And it is ordered that the defendants Edward James Pape, Charles William Langford and Thomas Howard Redfern their servants and agents be restrained until judgment or further order from publishing or making use of any of the copies of such letters or any information contained therein except for the purpose of the pending proceedings in the defendant Edward James Pape's bankruptcy and subject to the direction of the Bankruptcy Court." And the defendant William Nocton undertaking in the terms of the prayer to refrain from publishing any correspondence received by him as solicitor of the plaintiff, the Court made no order against him.

Lord Ashburton appealed and asked that the order might be varied by striking out the words "except for the purpose of the pending proceedings in the defendant Edward James Pape's bankruptcy and subject to the direction of the Bankruptcy Court."

Jenkins, K.C., and *A. àB. Terrell*, for the appellant. The restraint on the use of these copies ought to be absolute, without any exception with respect to the bankruptcy proceedings.

Communications which have passed between a client and his solicitor before any dispute has arisen between the client and his opponent are privileged from production, so the original letters cannot be used. If, however, an instrument in the hands of a solicitor which is privileged from production come improperly into the hands of a stranger who makes a copy of it, the secondary evidence so obtained is admissible in case of notice to produce the original being duly given, and the production resisted on the ground of privilege: *Calcraft* v. *Guest*. (1) But in this case there has been a breach of confidence on the part of Nocton. Pape obtained the letters from him, and a person who obtains privileged letters from any one who is in a fiduciary position is in no better position than the trustee himself. The equity prevails against parties deriving under the breach of contract or duty: *Tipping* v. *Clarke* (2); *Morison* v. *Moat*. (3) Pape obtained these papers improperly by a trick, and the Court will not allow him to use them. An injunction for that purpose can be granted before the case comes on for trial, although at the hearing these copies might be admissible as secondary evidence.

[COZENS-HARDY M.R. referred to *Lamb* v. *Evans*. (4)]

Giveen, for Messrs. Langford & Redfern, took no part in the argument.

Pape did not appear.

COZENS-HARDY M.R. This is a curious case, and in some respects it raises rather an important question. [His Lordship stated the facts and continued:] The time for the operation of the subpœna had not arrived, so this is simply a case in which the documents were, by collusion between Pape and the clerk, obtained from their proper custody and handed over to Pape, who had nothing to do with them. Pape is not a solicitor, and there is no direct confidential relation between him and Lord Ashburton. That being so, Lord Ashburton commences this action, and he claims by his writ: [His Lordship read the claim.] It came before the learned judge, Neville J., who made an order that Pape

(1) [1898] 1 Q. B. 759.
(2) (1843) 2 Hare, 383.
(3) (1851) 9 Hare, 241.
(4) [1893] 1 Ch. 218, 235.

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do forthwith hand over to Nocton all original letters from the plaintiff to Nocton or his firm in Pape's possession or control. Pape naturally said "I do not object to that; I will deliver up the originals, because I have got copies." Then the order goes on in this way: "And it is ordered that the defendants Edward James Pape, Charles William Langford and Thomas Howard Redfern their servants and agents be restrained until judgment or further order from publishing or making use of any of the copies of such letters or any information contained therein except for the purpose of the pending proceedings in the defendant Edward James Pape's bankruptcy and subject to the direction of the Bankruptcy Court." Now, the question is raised that that exception is wrong, and that the injunction ought to go to the full extent until the trial of the action, namely, from publishing or making use of any of the copies of letters or information contained therein. In my opinion the contention of the appellant is right. Nocton's clerk, of course, had no right whatever to hand over the originals to Pape nor to make any copies of any sort or kind, and Pape, who was really a party to this transaction, was quite clearly under the same obligation, and liable to precisely the same jurisdiction as has long been exercised by this Court. I do not go back to *Morison* v. *Moat* (1), which, although not the first, is probably the leading authority on the point, but one passage from *Lamb* v. *Evans* (2), in a judgment of Kay L.J., states briefly and, I think, with perfect accuracy what the true law is upon this subject. He says referring to *Morison* v. *Moat* (1): "Then the judgment goes on to give several instances, and many of them are of cases where a man, being in the employment of another, has discovered the secrets of the manufacture of that other person, or has surreptitiously copied something which came under his hands while he was in the possession of that trust and confidence, and he has been restrained from communicating that secret to anybody else, and anybody who has obtained that secret from him has also been restrained from using it." Apart, therefore, from these pending or threatened proceedings in bankruptcy, it seems to me to be perfectly clear that the plaintiff can obtain the

(1) 9 Hare, 241. (2) [1893] 1 Ch. 218, 235.

unqualified injunction which he asks for. Now, can it make any difference that Pape says "I want, by means of these copies, to give secondary evidence in the bankruptcy proceedings?" In my opinion that is no ground for making any distinction. The rule of evidence as explained in *Calcraft* v. *Guest* (1) merely amounts to this, that if a litigant wants to prove a particular document which by reason of privilege or some circumstance he cannot furnish by the production of the original, he may produce a copy as secondary evidence although that copy has been obtained by improper means, and even, it may be, by criminal means. The Court in such an action is not really trying the circumstances under which the document was produced. That is not an issue in the case and the Court simply says "Here is a copy of a document which cannot be produced; it may have been stolen, it may have been picked up in the street, it may have improperly got into the possession of the person who proposes to produce it, but that is not a matter which the Court in the trial of the action can go into." But that does not seem to me to have any bearing upon a case where the whole subject-matter of the action is the right to retain the originals or copies of certain documents which are privileged. It seems to me that, although Pape has had the good luck to obtain a copy of these documents which he can produce without a breach of this injunction, there is no ground whatever in principle why we should decline to give the plaintiff the protection which in my view is his right as between him and Pape, and that there is no reason whatever why we should not say to Pape in pending or future proceedings, "You shall not produce these documents which you have acquired from the plaintiff surreptitiously, or from his solicitor, who plainly stood to him in a confidential relation." For these reasons I think the appeal ought to be allowed so far as it asks, and only so far as it asks, to strike out the exception.

KENNEDY L.J. I agree with the conclusion to which the Master of the Rolls has come. It is a peculiar case. So far as I know, it stands alone, and we have had cited to us no authority upon anything like the same facts. The principle which has

(1) [1898] 1 Q. B. 759.

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been stated by the Master of the Rolls upon which a person would be restrained from dealing with documents or using information in documents which he has obtained wrongly, and knows he has obtained wrongly, is clear. The only question is, and that is the difficulty my brother Neville felt, that it is also quite clear that if the ground for secondary evidence has been properly laid at the trial it is no objection to using that secondary evidence in the shape of a copy of a document that that copy ought not to have been obtained in the way that it has been. Neville J., there being here unquestionably legal proceedings in which the question of the production of an original or the use of a copy, being a copy which had been wrongfully obtained, may be material, has thought he ought to hold his hand. I agree that the better view seems to me to be that although it is true that the principle which is laid down in *Calcraft* v. *Guest* (1) must be followed, yet, at the same time, if, before the occasion of the trial when a copy may be used, although a copy improperly obtained, the owner of the original can successfully promote proceedings against the person who has improperly obtained the copy to stop his using it, the owner is none the less entitled to protection, because, if the question had arisen in the course of a trial before such proceedings, the holder of the copy would not have been prevented from using it on account of the illegitimacy of its origin. If that is so, it decides this case. There is no question here as to the facts, and on them it is quite clear these copies ought never to have got into Mr. Pape's possession in any shape or form.

SWINFEN EADY L.J. I am of the same opinion. The facts here are not in dispute. Lord Ashburton wrote letters to his solicitor, Mr. Nocton, which certainly are privileged prima facie. Mr. Nocton had in his employ a clerk named Brooks. The clerk of a solicitor is in a confidential position. His duty is not to disclose his master's business, the client's business, and certainly to carefully guard his master's papers. Brooks the clerk, in this case apparently having regard to a subpœna duces tecum served upon him personally (why it came to be served

(1) [1898] 1 Q. B. 759.

upon him instead of his employer in whose legal custody the letters were does not appear), took the letters written by Lord Ashburton to Nocton, and attended the Bankruptcy Court with them; he was not called on his subpœna, but gave up possession of the letters to Pape. Such an act on the part of Brooks is perfectly indefensible; it was a gross breach of his duty. Pape having thus obtained possession of the letters has proceeded to copy them and still retains the copies in his possession. The principle upon which the Court of Chancery has acted for many years has been to restrain the publication of confidential information improperly or surreptitiously obtained or of information imparted in confidence which ought not to be divulged. Injunctions have been granted to give effectual relief, that is not only to restrain the disclosure of confidential information, but to prevent copies being made of any record of that information, and, if copies have already been made, to restrain them from being further copied, and to restrain persons into whose possession that confidential information has come from themselves in turn divulging or propagating it. Not the first case, but one of the early cases, is *Tipping* v. *Clarke*. (1) It was a case where a factor had had dealings with a merchant and disputes had arisen between them; and the merchant, the defendant, in some way had obtained copies of certain entries in the factor's books, not only with regard to the dealings of the factor with the merchant himself, but with other persons, and he threatened to make them public, and said that he had a copy of the accounts of the plaintiff's Irish friends, and that he intended to call a meeting, his object being to make a public exhibition of the plaintiff's books. That matter was the subject of the litigation in *Tipping* v. *Clarke* (1) and came before the Court on an exception to the answers to interrogatories. The Vice-Chancellor dealt with the matter on principle, and said (2): "It is clear that every clerk employed in a merchant's counting-house is under an implied contract that he will not make public that which he learns in the execution of his duty as clerk." That exactly applies to a solicitor's clerk as well as to a merchant's clerk. "If the defendant has obtained copies of books, it would very

(1) 2 Hare, 383. (2) 2 Hare, 393.

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probably be by means of some clerk or agent of the plaintiff and if he availed himself surreptitiously of the information, which he could not have had except from a person guilty of a breach of contract in communicating it, I think he could not be permitted to avail himself of that breach of contract." That is Pape's position here. If he is allowed to retain possession of these copies or to divulge the contents, he is availing himself of the breach of contract by Brooks the clerk, by means of which these letters have come into his hands. In *Lamb* v. *Evans* (1) Kay L.J. said: "Then the judgment goes on to give several instances, and many of them are of cases where a man, being in the employment of another, has discovered the secrets of the manufacture of that other person, or has surreptitiously copied something which came under his hands while he was in the possession of that trust and confidence, and he has been restrained from communicating that secret to anybody else"—and then the next stage—"and anybody who has obtained that secret from him has also been restrained from using it." There are many similar cases to the like effect, where the use of information improperly obtained has been restrained and the parties into whose possession it has come have been restrained from using or divulging it. Down to that point there can be no dispute as to the law. Then objection was raised in the present case by reason of the fact that it is said that Pape, who now has copies of the letters, might wish to give them in evidence in certain bankruptcy proceedings, and although the original letters are privileged from production he has possession of the copies and could give them as secondary evidence of the contents of the letters, and, therefore, ought not to be ordered either to give them up or to be restrained from divulging their contents. There is here a confusion between the right to restrain a person from divulging confidential information and the right to give secondary evidence of documents where the originals are privileged from production, if the party has such secondary evidence in his possession. The cases are entirely separate and distinct. If a person were to steal a deed, nevertheless in any dispute to which it was relevant the original deed might be given in evidence by

(1) [1893] 1 Ch. 218, 235.

him at the trial. It would be no objection to the admissibility of the deed in evidence to say you ought not to have possession of it. His unlawful possession would not affect the admissibility of the deed in evidence if otherwise admissible. So again with regard to any copy he had. If he was unable to obtain or compel production of the original because it was privileged, if he had a copy in his possession it would be admissible as secondary evidence. The fact, however, that a document, whether original or copy, is admissible in evidence is no answer to the demand of the lawful owner for the delivery up of the document, and no answer to an application by the lawful owner of confidential information to restrain it from being published or copied.

In my judgment, the appeal ought to be allowed, and the exception struck out of the order.

Appeal allowed.

Solicitors: *H. S. Knight Gregson; Langford & Redfern.*

H. C. R.

NEVILLE J.

1913

May 8, 20; *June* 18.

In re COZENS.

GREEN *v.* BRISLEY.

[1913 C. 785.]

Trustee and Cestui que Trust—Breach of Trust—Appropriation of Security by Defaulting Trustee to meet Breach of Trust—Declaration of Trust—Equitable Mortgage—Irrevocable Declaration—Statute of Frauds (29 *Car.* 2, *c.* 3), *s.* 7.

In all cases where it is alleged that a defaulting trustee has appropriated securities to make good his breaches of trust, and a declaration of trust is relied on, the Court must be satisfied that a present irrevocable declaration has been made.

The Court refused to accept as evidence of such a declaration of trust pencil entries in private accounts kept by the defaulting trustee never communicated to any one, and which in some cases appeared to have been altered.

Semble the absence of communication in itself raises a strong inference against an intention to make the appropriation irrevocable.

Middleton v. *Pollock* (1876) 2 Ch. D. 104, explained.

John Short, who died on January 3, 1890, by his will appointed Alfred Cozens his sole executor and trustee, and left his property in trust for his wife for life with remainders over. Cozens proved the will and acted in the trust, received considerable sums of money, and retained and appropriated to his own use sums amounting to 442*l.* 12*s.* He never rendered any account to the beneficiaries and apparently kept none except as hereinafter mentioned. He died on December 31, 1912, having by his will appointed J. J. R. Green and another his executors. The will was proved by Green alone.

A. Cozens resided up to his death in a leasehold house known as "Ecclesbourne," 26, Darenth Road, Stamford Hill, which was his own property. His estate at his death was realized and produced rather less than 400*l.*; he owed to creditors, other than his cestuis que trust, 112*l.*

It was alleged that Cozens had treated the sums retained by him as advanced to him upon equitable mortgage of "Ecclesbourne," and appropriated that house as security for their repayment.

The only evidence of such appropriation consisted of certain accounts in Cozens' handwriting found among his papers by his executor. Of these document 1, marked J. J. R. G. 1, was an account which, after columns containing entries of cash received, was in the following form and contained, among many other entries of investment on mortgages, the following entries:—

Date.	Principal.				Particulars.	Mtgor.
	£	*s.*	*d.*			
1890-1891	313	16	10		Debts, Funeral and Testamentary Expenses.	
June, July	60	2	4		Advance.	Ecc.
1899						
July 11	40	0	0	£90	Advance.	Ecc.
Aug. 23	10	0	0			
— 28	40	0	0			
1901						
Jan. 26	25	0	0		,,	,,
May 12	25	0	0		,,	,,
1902						
September	22	9	8		,,	,,
1905						
November	50	0	0		,,	,,
1906						
May	20	0	0		,,	,,
July	30	0	0		,,	,,
1907	20	0	0		,,	,,
1908	10	0	0		,,	,,

On the last page of this document the above-mentioned dates and sums were extracted and set out under the heading "Ecc." and added up, shewing a total of 352*l.* 12*s.* It was admitted that the abbreviation "Ecc." was intended to stand for "Ecclesbourne,"

NEVILLE J. 1913 COZENS, *In re.* GREEN *v.* BRISLEY.

the name of Cozens' house. The headings of this document were in ink but all the entries were in pencil.

Document 2 was an account marked J. J. R. G. 2 "Cap. a/c." begun in ink but continued and altered in pencil. It contained on the credit side entries of all the amounts extracted from J. J. R. G. 1 above. The first entry as finally altered was "Cash advance to A. C. at 4% on secy of 26 D. R. St. Hill 60*l.* 2*s.* 4*d.*"; the other amounts were variously entered as "Advance on Eq. Deposit," "Advance on Eq. D. to A. C." or "Advance to A. Cozens at 4%." This account was carried to a later date than J. J. R. G. 1 and contained other items which raised the total sum to 442*l.* 12*s.* Alterations had been made in this account which are more minutely stated in the judgment.

Documents 3, 4, 5, and 6, marked J. J. R. G. 3, 4, 5, and 6 respectively, were income accounts, or drafts of income accounts in which Cozens had credited himself with payment to the tenant for life of interest on all the sums retained by him. These payments were actually made. All the accounts were entered in pencil on loose sheets ruled for accounts and fastened together with paper fasteners.

Document No. 7, marked J. J. R. G. 7, was a bound account book described as a rough ledger containing several accounts relating to the trust estate. In one headed "Capital Account" the sum of 60*l.* 2*s.* 4*d.* retained by Cozens on July 3, 1891, was originally entered "To transfer investment account," but this had been altered in pencil to "A. C. Eq. deposit balance."

The item was carried to an account in pencil on a different page in the book headed "Investment Account Deposits," but was the only entry in that account.

The house had been mortgaged by Cozens to one Osment for 420*l.*, repayable by quarterly instalments. The money was repaid and the house reconveyed in 1899. In 1902 the deeds were deposited by Cozens with one Debenham to secure 50*l.* The money was paid and the deeds returned in 1909, and in 1911 Cozens mortgaged the house to the London and South-Western Bank for 50*l.*, which was still owing at his death.

After Cozens' death new trustees were appointed of Short's will, and Green, as executor of Cozens, took out this summons

for the determination of the questions, (1.) whether the trustees were entitled to any charge or incumbrance upon the leasehold premises No. 26, Darenth Road, Stamford Hill, in respect of the sum of 442*l.* 12*s.* claimed by them as due from Cozens' estate; (2.) whether they were entitled as creditors of the estate to any preference or priority.

The defendants were the new trustees of Short's will, and one of the general creditors appointed to represent the rest.

F. C. Wynn Werninck, for the summons.

J. F. Carr, for the trustees of Short's will. There is sufficient evidence that Cozens appropriated the deeds of his leasehold house as an equitable security for the moneys retained by him, and that appropriation is valid: *Middleton* v. *Pollock* (1); *New, Prance and Garrard's Trustee* v. *Hunting* (2), affirmed in the House of Lords, sub nom. *Sharp* v. *Jackson* (3); *Taylor* v. *London and County Banking Co.* (4) Lord Macnaghten's judgment in *Tailby* v. *Official Receiver* (5) shews that in cases of equitable assignment it is the intention of the party that matters; the form is unimportant.

Apart from appropriation Cozens had mixed this money with his own, and paid off Osment's mortgage out of the mixed fund, that gives the beneficiaries under Short's will a right to the charge so paid off.

Whitmore Richards, for the ordinary creditors. Such documents as there are in this case cannot be read as amounting to a declaration of trust, and Short's trustees can only succeed if they can make out that there is a good equitable mortgage. In what ways an equitable mortgage can be created is discussed in the case of *Russel* v. *Russel* (6), and it is clear that a memorandum of an intention to make one is not sufficient. *Wilson* v. *Balfour* (7) and *Adams* v. *Claxton* (8) are authorities to that effect. There could be no equitable mortgage by deposit, for

(1) 2 Ch. D. 104.
(2) [1897] 2 Q. B. 19.
(3) [1899] A. C. 419.
(4) [1901] 2 Ch. 231.
(5) (1888) 13 App. Cas. 523, 543.
(6) (1783) 2 Wh. & T. L. C., 8th ed. 93.
(7) (1811) 2 Camp. 579.
(8) (1801) 6 Ves. 226.

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the property was in mortgage, and the deeds were not in Cozens' custody or power. In the three cases relied upon the deeds or securities were in the possession of the persons making the appropriation and there was a clear declaration of trust.

If there was any declaration of trust it related to land, and it is not manifested and proved by writing signed by a person in law enabled to declare it, as required by s. 7 of the Statute of Frauds.

Cur. adv. vult.

June 18. NEVILLE J. In this case one Cozens (his initials were A. C.) was executor under the will of John Short, who died in 1890. He received payments on account of the estate and from time to time helped himself to moneys in his hands. A list of sums so dealt with appears on the last page of a pencilled account in the handwriting of Cozens. This account apparently shews the year and month in which the appropriations were made, and the items appropriated, amounting in all to 352*l.* 12*s.* After the first three items the items are merely entered as advances, although the letters "Ecc." are entered in the column headed "Mtgor." and are put at the head of the list above mentioned. These letters presumably represent "Ecclesbourne," the name of a house in Darenth Road, Stamford Hill, belonging to Cozens. It was mortgaged at the time of the advance of 60*l.* 2*s.* 4*d.*, but the title deeds had been returned to him at the time when the sums of 40*l.*, 40*l.*, and 10*l.*, making up the sum of 90*l.*, were misappropriated—that is between 1899 and 1902. In 1902 the deeds were deposited by Cozens with one Debenham to secure 50*l.* This sum was paid off and the deeds returned in 1909. In 1911 the property was mortgaged to the London and South-Western Bank for 50*l.* Interest at the rate of 4 per cent. per annum was apparently paid regularly to the persons entitled under Short's will from the time of the misappropriations, but I do not think the entries in the income accounts throw any light upon the question whether Cozens intended to give his cestuis que trust a mortgage or charge upon "Ecclesbourne" beyond this, that by crediting himself with these payments he treated himself as a debtor to the estate.

The three first items of 60*l.* 2*s.* 4*d.*, 90*l.*, and 25*l.* require somewhat closer attention. In the account above mentioned marked J. J. R. G. 1 (which is headed in ink and entered in pencil) under date 1890 and 1891 June and July appears an entry of 373*l.* 19*s.* 2*d.* cash received, which is accounted for by two sums of 313*l.* 16*s.* 10*d.* and 60*l.* 2*s.* 4*d.* under the heading of "Principal." Under the heading "Particulars" the 313*l.* 16*s.* 10*d.* is debited to "Debts, funeral and testamentary expenses," while the 60*l.* 2*s.* 4*d.* is debited to "Advance." Under the heading "Mtgor." appear the letters "Ecc." Between July 11, 1899, and 1908 the other items appearing in the list are debited in the same way, "Advance" "Ecc."

In another account (J. J. R. G. 2) headed "Cap. a/c," which is begun in ink and continued in pencil, under date July 3, 1891, is an entry in ink "cash" followed by a word I cannot decipher; then follow the letters and figures "A. C. at 4 %." By pencil alterations made at some time or times subsequent to the original entry, the undecipherable word is struck out and "advance to" written above, and the words "on secy of 26 D. R. St. Hill" are added, so that the entry as finally altered in pencil reads "Cash advanced to A.C. at 4 % on secy of 26 D. R. St. Hill 60*l.* 2*s.* 4*d.*" Further on in the account there was originally an entry in pencil under date July 7, "Advance Eq. Dep. 90*l.* 0*s.* 0*d.*" This appears to have been interlined. On the same page appears an entry under date July 26, 1901, "Advance to A. Cozens at 4 % 25*l.* 0*s.* 0*d.*" The item of 90*l.* and the whole of the page has been cancelled in pencil and a substituted sheet pinned over it containing the following entries:—

"11th	July 1899	Advance on Eq. D.	40*l.*"
"23	Aug. ,,	Advance on Eq. D.	10*l.*"
"28	Do.	Do.	40*l.*"

There have been other pencil entries on this sheet which, either before or after the insertion of those referred to, have been rubbed out.

The next advance of 22*l.* 9*s.* 8*d.* is entered in J. J. R. G. 1 under date September, 1902, "Advance Ecc.," and in J. J. R. G. 2 under date August 8, 1902, "Advance to A. Cozens at 4 %."

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The other advances are entered in the two accounts respectively "Advance Ecc." and "Advance to Cozens at 4 %." In an account book, the entries in which are in fact accounts of Short's estate, at page 31 there is an entry in an account headed "Capital a/c" under date July 3, 1891, "To transfer investment a/c 60*l.* 2*s.* 4*d.*" This has been cancelled in pencil and there has been inserted in pencil at some time or other "A. C. Eq. Dep." "Deposit" "Balance." This item has been carried over to folio 74, which is headed in pencil "Investment Account Deposits," and the only entry is in pencil "To cash balance of cap. a/c 60*l.* 2*s.* 4*d.*" with a cross reference to folio 31. There is no material evidence except the entries.

Upon this evidence I am asked to hold that a good security in favour of Short's estate has been effected upon the Ecclesbourne property or Cozens' interest in it for all or some of the amounts misappropriated by Cozens. I am referred to *Middleton* v. *Pollock* (1), *New, Prance and Garrard's Trustee* v. *Hunting* (2), and *Taylor* v. *London and County Banking Co.* (3) as cases justifying the contention. In the first of these cases the trust was declared in explicit terms in writing signed by the debtor, although I think the true explanation of the case is that which I refer to later on. The second purports to follow the first, and it was admitted by counsel that, with regard to certificates of shares deposited in boxes containing the securities and papers of several trust estates with a memorandum of deposit signed by the debtor stating that they were deposited as additional security for moneys due to the trust estate, the case was indistinguishable from *Middleton* v. *Pollock*. (1) *Middleton* v. *Pollock* (1) is there explained by Chitty L.J. in the following terms (4): "In that case a fund had been placed in the hands of a solicitor for investment: therefore it was his duty to make the investment, and the nature of the investment to be made was left to him. Under those circumstances it was clear that there was a valid appropriation of the property to which the memorandum in that case referred as security for the amount entrusted to the solicitor for

(1) 2 Ch. D. 104.
(2) [1897] 2 Q. B. 19.
(3) [1901] 2 Ch. 231.
(4) [1897] 2 Q. B. 19, 32.

investment. The case of *Wilson* v. *Balfour* (1) appears to me to stand on a different footing altogether." In *Wilson* v. *Balfour* (1) Lord Ellenborough no doubt held that the appropriation rested in intention only until the eve of the bankruptcy, but it is to be noted in that case that the bank who had fraudulently sold out their customer's stock wrapped up certain bonds belonging to them in an envelope inscribed with the customer's name and enclosing a memorandum stating that they had deposited the bonds with him as a collateral security for his stock, and deposited the envelope among the securities which they held for their clients, afterwards forwarding them to their customer. Lord Ellenborough says this (2): "The whole rested in *intention*. The possession was never put out of themselves. Noble was no agent of the defendant for the purpose of receiving the bonds. The defendant was entirely ignorant of the transaction. Noble was a wrongdoer in selling the 5 per cents.; and after that breach of trust, the defendant was placed in the same situation as the other creditors of the house. A contemplated appropriation cannot be a virtual transfer. Had the memorandum been true, had the bonds been *deposited* with the defendant, he would have had an equitable title to them, and might have retained them till his debt was satisfied. But they were not deposited with him; they remained in the possession of the bankrupts; they might have been taken from the iron chest and carried into the market without his ever knowing that his name had been written on the envelope."

In *Taylor* v. *London and County Banking Co.* (3) a solicitor, who had misappropriated trust funds, by entries in his books under the heading of the trust purported to appropriate a mortgage debt of his own to answer the sum he had misappropriated. Subsequently he dealt with the mortgage inconsistently with this appropriation. It was held by Vaughan Williams and Stirling L.JJ. (Rigby L.J. dissenting) that this was a good appropriation. The evidence relied upon appears to have been entries in Tasker's private books of account attributing the interest payable by Ward the mortgagor to the

(1) 2 Camp. 579. (2) 2 Camp. 582.

(3) [1901] 2 Ch. 231.

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trustees. The Lords Justices appear to have considered that the circumstances brought the case within *Middleton* v. *Pollock* (1) and *New, Prance and Garrard's Trustee* v. *Hunting.* (2) The finding in question does not appear to have been necessary for the decision of the case.

The question of how far the entries relied upon could or did satisfy the 7th section of the Statute of Frauds does not appear to have occupied the attention of the Court of Appeal. It is somewhat startling to find, if that indeed be the case, that a man can declare a trust in the secrecy of his chamber, uncommunicated to any living creature, on the eve of bankruptcy, by which he can determine which of his creditors shall be paid in full and which shall go without their money; so long as he is actuated not by sympathy for the creditor but by a desire to protect himself.

The questions in this and similar cases are after all mainly decisions on questions of fact, and it must be borne in mind that in each case where a declaration of trust is relied on the Court must be satisfied that a present irrevocable declaration of trust has been made, and where, as in this case, an interest in land is affected the declaration must be manifested and proved by some writing signed by the party enabled by law to declare it.

In my opinion the absence of communication raises a strong inference against an intention to make an appropriation irrevocable. In the absence of evidence to the contrary I think the inference is that silence was intended to enable the declarant to adhere to or abandon the declaration as best served his advantage for the time being.

I cannot but think that the true explanation of *Middleton* v. *Pollock* (1) is that given by Chitty L.J., and that it depended upon the fact that where an agent has a duty to purchase securities for his principal and does purchase securities within his authority which he allocates towards satisfaction of his obligation they belong to the principal whether purchased out of the actual money provided by him or not.

Where security is given for a pre-existing debt the question of its validity is obviously not important so long as the debtor

(1) 2 Ch. D. 104. (2) [1897] 2 Q. B. 19.

remains solvent. The question therefore where material is always between his creditors.

In my opinion, where the security is given for a past debt merely and not disclosed to the creditor, it is purely voluntary, and the Court will not assist the creditor if his security be imperfect: compare *Wigan* v. *English and Scottish Law Life Assurance Association* (1) with *Glegg* v. *Bromley*. (2)

In the present case I find no writing sufficient to satisfy the Statute of Frauds, nor am I satisfied by the evidence that there was ever any present and irrevocable intention on the part of Cozens to declare himself a trustee of his interest in the Ecclesbourne property in respect of any of the sums which he misappropriated. The entries appear to me rather to point to an intention to create a charge by a deposit of deeds which was never fulfilled. And, further, having regard to the character of the entries, the fact that they were in pencil and that in some cases they seem to have been substituted for or accompanied by other entries which have been erased, I cannot treat them as other than trial entries intended to endure if and so far as they might suit the interest of the defaulting trustee.

In my opinion, therefore, Short's trustees have no security over the Ecclesbourne property, and I answer questions 1 and 2 of the summons in the negative.

Solicitors: *Tatham, Oblein & Nash; Cautley Tatham.*

(1) [1909] 1 Ch. 291. (2) [1912] 3 K. B. 474.

J. R. B.

WARRINGTON J.
1913
July 16.

In re MAYELL.
FOLEY *v.* WOOD.

[1913 M. 1129.]

Will—Misdescription—Latent Ambiguity—Falsa demonstratio.

Testator, who died in 1913, by his will made in 1908, appointed an executor and directed "my two freehold cottages or tenements, with their appurtenances, situated at Trowbridge, known as Nos. 19 and 20, Castle Street," to be sold by auction and the proceeds to be divided between two of his daughters. He also specifically devised his freehold cottage or tenement known as No. 35, The Conigre, Trowbridge, to one of his sons, and his freehold cottage or tenement known as No. 39, Castle Street, Trowbridge, to another daughter. There was no residuary devise. At the date of his will and death the testator owned freehold premises known as Nos. 19 and 20, Thomas Street, Trowbridge, in addition to No. 35, The Conigre, and No. 39, Castle Street, but Nos. 19 and 20, Castle Street were not and never had been the testator's property:—

Held, that in the description of Nos. 19 and 20 the words "Castle Street" ought to be rejected as falsa demonstratio merely, and that Nos. 19 and 20, Thomas Street passed under the specific devise, the testator having no other houses in Trowbridge so numbered.

Adjourned Summons.

By his will made in October, 1908, William Mayell, of No. 39 Halve, Trowbridge, who died in 1913, appointed Herbert Graham Foley, of Manvers Street, Trowbridge, to be his executor, and bequeathed to him the sum of 5*l.* free of legacy duty, and directed payment of his debts and funeral and testamentary expenses, and continued: "I direct that my two freehold cottages or tenements with the appurtenances belonging thereto situated at Trowbridge known as numbers 19 and 20 Castle Street be sold by auction by Messrs. Foley, Son & Mundy, of Manvers Street, Trowbridge, and the proceeds therefrom, after deducting the costs of realisation, shall be divided in equal portions between my daughters Laura Jane Ward wife of Alderbert D. Ward . . . . and Ada Eva Taylor wife of George H. Taylor . . . . I give and bequeath to my son Samuel Jesse Mayell for his own absolute use my silver watch and chain, my household furniture and

effects, excepting money at number 39 Halve Trowbridge, and my freehold cottage or tenement with the appurtenances thereto belonging known as number 35 The Conigre Trowbridge. I give and bequeath to my daughter Mabel Ethel Mayell for her own absolute use my freehold cottage or tenement with the appurtenances thereto belonging known as number 39 Castle Street Trowbridge. Out of the money of which I shall die possessed I direct my executor to divide in equal portions between my son Samuel Jesse Mayell and my daughter Mabel Ethel Mayell after the payment of the legacy aforesaid and my debts funeral and testamentary expenses."

At the date of his will and death the testator owned two freehold houses situated in Trowbridge, known as Nos. 19 and 20, Thomas Street, in addition to No. 35, The Conigre, and No. 39, Castle Street, but Nos. 19 and 20, Castle Street were not and never had been the testator's property.

This was an adjourned summons raising the question whether Nos. 19 and 20, Thomas Street passed under the specific devise of the premises described as Nos. 19 and 20, Castle Street.

Roger W. Turnbull, for the executor.

Bischoff, for the two daughters. The words "Castle Street" appear to be a clerical error for "Thomas Street" occasioned by the subsequent mention of 39, Castle Street, and an error of this kind is capable of correction by a Court of construction. In *In re Northen's Estate* (1) Chitty J. in a passage in a will disposing of two estates read "the said Croxton estate" in place of "the said Lea Knowl estate" where there had been a similar error.

[WARRINGTON J. In that case there was a context in the will which enabled him to do so: Theobald on Wills, 7th ed. p. 754.]

In any case the words "Castle Street" can be rejected as falsa demonstratio, and the two houses numbered 19 and 20, Thomas Street are then clearly identified as the subject-matter of the devise, the testator having no other houses in Trowbridge so numbered. The use of the word "my" introduces a latent ambiguity into the description.

(1) (1884) 28 Ch. D. 153.

WARRINGTON J. 1913 MAYELL, *In re.* FOLEY *v.* WOOD.

R. L. Ramsbotham, for the heiresses-at-law of the testator. There is an intestacy as to these two houses. There is property exactly answering the description of Nos. 19 and 20, Thomas Street, and the case falls within the rule stated in Starkie on Evidence, 3rd ed. p. 774, "Where a subject-matter exists, which satisfies the terms of the will, and to which they are perfectly applicable, there is no latent ambiguity; and no evidence can be admitted for the purpose of applying the terms to a different object," citing *Lord Walpole* v. *Lord Cholmondeley.* (1) The same rule is stated in *Miller* v. *Travers* (2) and *Whitfield* v. *Langdale.* (3)

WARRINGTON J. This is a somewhat curious case. The testator had at the date of his death two houses situated in Trowbridge, known as Nos. 19 and 20, Thomas Street. He was also the owner of another house known as No. 35, The Conigre, and of another known as No. 39, Castle Street, both in Trowbridge. Those properties constituted all the real estate which he possessed. He made his will in 1908 in the following terms. [His Lordship read the will and proceeded:] Although there were in fact two houses known as Nos. 19 and 20, Castle Street, they did not belong to the testator. The two houses so numbered which belonged to him were 19 and 20, Thomas Street. The question is, Can this will be so read as to pass these two houses, in other words, are the words "Castle Street" an essential part of the description, or are they a mere falsa demonstratio? Whatever view may be taken of this question, the evidence placed before me is plainly admissible. It is not evidence of intention but of material facts which a Court of construction must know before it is in a position to interpret the will. It is clear on that evidence that there is no subject-matter completely answering the whole of the description. Part of the description consists of the word "my," and that part is plainly incorrect if "Castle Street" means Castle Street. Again, if the words "Castle Street" are omitted there is no difficulty in identifying the property intended to be devised. In that case the will reads as a devise

(1) (1797) 7 T. R. 138. (2) (1832) 8 Bing. 244.
(3) (1875) 1 Ch. D. 61, 74.

of " my two freehold cottages or tenements situated in Trowbridge known as Nos. 19 and 20 " ; in other words, there is a sufficient description of the property which the testator intended to devise without resorting to the words Castle Street. I think, therefore, that I am entitled to reject those words as not being an essential part of the description, treating them as falsa demonstratio merely, and then there is no difficulty in holding that the two cottages or tenements situated in Trowbridge known as Nos. 19 and 20 must mean 19 and 20, Thomas Street, because the testator had no other houses in Trowbridge known by those numbers. I hold, therefore, that Nos. 19 and 20, Thomas Street passed under the specific devise.

Solicitors: *Calder Woods & Pethick, for F. A. P. Sylvester, Trowbridge; Billing & Co.*

A. C.

In re HUGHES. ELLIS *v.* HUGHES.

[1913 H. 926.]

Administration—Lease by Testator—Covenant by Lessor—Specific Devise of Reversion—Liability for Performance after Lessor's Death.

In 1901 the testator demised freehold premises used as pottery works to lessees for a term of fourteen years at a yearly rent of 120*l.*, and thereby covenanted with the lessees that he would, if required by the lessees during the term, build an additional oven and cone and shed and workshops according to the plan prepared by a named architect, the lessees paying an additional rent at the rate of 10*l.* per cent. per annum on the gross outlay of the lessor on the works, such additional rent to be computed from the date when the architect should certify in writing that the works had been completed. There was no actual plan in existence at the date of the lease, but shortly afterwards the architect prepared a plan and the workshops were erected by the testator, but disputes having arisen as to the proposed site of the other works, nothing further was then done. The testator died in 1909, having by his will, which was made in the same year, specifically devised the demised premises. In 1911 the lessee required the testator's executors to complete the works, and the disputes were referred to arbitration, and the arbitrator by his award required the executors to erect the works on part of the demised premises and to pay the costs of the award. On a

WARRINGTON J.

1913

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summons raising the question whether the expenses of erecting the works and the costs of the arbitration were payable by the specific devisees in exoneration of the testator's general estate:—

Held, that the obligation imposed by the covenant was not one in its nature incident to the relation of landlord and tenant, but was preparatory to the complete establishment of that relation, and therefore, according to the law stated in *Eccles* v. *Mills* [1898] A. C. 360, was one which, as between the specific devisees of the reversion and the general estate, ought to be primarily borne by the general estate.

ADJOURNED SUMMONS.

By an indenture of lease dated July 16, 1901, Thomas Hughes, the testator, demised certain premises used as pottery works to lessees for a term of fourteen years from June 24, 1901, at a yearly rent of 120*l.*, and thereby covenanted with the lessees that he would if required by the lessees or the survivor of them, or the executors, administrators, or assigns of such survivor, during the term thereby demised build an additional oven and cone and shed and workshops according to the plan prepared by Mr. George Lewis Jones, the lessees paying an additional rent at the rate of 10*l.* per cent. per annum on the gross outlay of the lessor on the said buildings, such additional rent to be computed from the date when the said George Lewis Jones should certify in writing that the said buildings had been completed.

It appeared that there was no actual plan in existence at the date of the execution of the lease, but shortly afterwards George Lewis Jones had prepared a plan of additional workshops, which were shortly afterwards erected by the testator, and of an additional kiln to be substituted for the oven, cone, and shed mentioned in the lease. This kiln, however, was not erected apparently because the proposed site was not upon the demised premises, and owing to differences as to the proposed site of the new works nothing further was then done, though the testator never disputed his liability to erect the additional buildings.

The testator died on September 19, 1909, having by his will dated April 21, 1909, appointed executors and specifically devised the demised premises to a son for life with remainder to the son's daughters in fee simple.

In November, 1911, Arthur Wood, in whom the term was then vested, gave written notice to the executors of the testator that he

required the additional buildings to be erected. Disputes, however, arose between them as to the proper construction and performance of the covenant, and pursuant to a provision in the lease the disputes were referred to arbitration. The arbitrator made his award dated January 6, 1913, requiring the executors to erect the works on such part of the demised premises as the lessee might select and in accordance with plans to be prepared by the said George Lewis Jones, and awarded that the executors should pay to the lessee the sum of 25*l.* for his costs of the reference and award and that the executors should pay their own costs and the whole of the arbitrator's costs. The estimates for the works amounted to 461*l.* and the architect's fees to 34*l.* 16*s.* 6*d.*, the total outlay together with the costs amounting to some 588*l.*

This was an adjourned summons raising (inter alia) the question whether the expenses of performing the testator's covenant to build the oven, cone, and shed and the costs of the award ought to be borne by the testator's personal estate or by the devisees of the reversion expectant on the determination of the lease; and asking that, if such expenses and costs ought to be borne by the devisees, the amount thereof might be raised by a mortgage of the reversion.

Clauson, K.C., and *J. W. Holmes*, for the executors.

J. G. Wood, for the specific devisee for life. The liability arose in the testator's lifetime, and the performance of the covenant was delayed only owing to the disputes which followed. The obligation was not incident to the relation of landlord and tenant within the meaning of the judgment of the Privy Council in *Eccles* v. *Mills* (1), but was introductory to that relation concerning something stipulated for by the lessee as a condition of taking the premises. The burthen ought therefore not to be borne by the specific devisees, but by the general estate.

T. J. C. Tomlin, for other persons in the same interest, supported the same argument and referred to *Marshall* v. *Holloway*. (2)

C. A. Bennett (*Cave, K.C.*, with him), for persons interested in the general estate. The obligation is one which ought to be borne

(1) [1898] A. C. 360. (2) (1832) 5 Sim. 196.

WARRINGTON J. 1913 HUGHES, *In re.* ELLIS *v.* HUGHES.

by the specific devisees who get the benefit of the additional rent. The covenant is one which runs with the reversion and is incident to the relation of landlord and tenant within the meaning of the judgment of the Privy Council in *Eccles* v. *Mills*. (1) The covenant was one which the lessee might not require to be performed during the greater part of the term. *Mansel* v. *Norton* (2) is a further authority in my favour.

Austen-Cartmell, for other parties.

WARRINGTON J. The question which I have to decide is whether the expenses of performing the testator's covenant contained in an indenture of lease to build certain works and the costs of the arbitrator's award relating thereto ought to be borne by the testator's personal estate or by the specific devisees of the property comprised in the lease. The facts are as follows. [His Lordship stated the facts and continued:] The question is whether these expenses are a liability imposed upon the specific devisees of the pottery works; in other words, are these expenses a burthen subject to which the devisees take the devised property and against which they must indemnify the general estate of the testator?

On the facts and inferences which I am entitled to draw I find that at the date of the lease these works were regarded as something which should be done at once and that the liability to do them arose, on the demand of the lessee, in the lifetime of the testator, and I have not to decide what would have happened if the lessee had for the first time required the works to be done after the death of the testator.

The point is not without authority. I refer especially to *Eccles* v. *Mills* (1), where the judgment of the Privy Council was delivered by Lord Macnaghten. In that case a lessor had demised to a lessee a farm of some 4000 acres for a term of fourteen years from September 1, 1868, and the lease contained a covenant by the lessor for himself, his heirs, executors, administrators, and assigns, that he, his heirs or assigns, would at his or their own expense on or before September 1, 1869, completely finish laying down in good English grass and in

(1) [1898] A. C. 360. (2) (1883) 22 Ch. D. 769.

accordance with the rules of good husbandry the 1000 acres which the lessor had already commenced to so lay down; and the lease contained a curious proviso that there "shall not be implied in this lease any covenant or provision whatever on the part of either of the parties hereto." The Privy Council came to the conclusion that the effect of this proviso was to qualify the covenant to lay down the 1000 acres in grass and to prevent it from running with the reversion; and it would have been sufficient for the purposes of the decision to have stopped there, but the Privy Council thought it desirable to express their opinion upon the general principles of law applicable to such a case, the reason being that Williams J., one of the judges in the Court below, had proceeded on the assumption that the covenant was unqualified, and on the admission of counsel that the covenant ran with the reversion, and on that footing had held that the reversioner ought to bear the burthen of the covenant, and accordingly Lord Macnaghten deals with that in the judgment. He first states the reasoning of the learned judge. He then goes on (1): "This reasoning does not appear to their Lordships altogether satisfactory. It does not perhaps keep sufficiently distinct the two principal questions which, on the assumption that the covenant runs with the reversion, would present themselves for consideration—the question whether the covenant is a burthen or charge on the reversion itself, and the question whether the covenant is in its nature incident to the relation of landlord and tenant. In regard to both, their Lordships have some difficulty in accepting the view of the learned judge. Granted that the covenant runs with the reversion, it does not follow that the liability under the covenant is a burthen upon the reversion. At common law no covenant ran with the reversion. By the statute of Henry VIII. all lessees have 'like action and remedy against all persons . . . . having any gift or grant . . . . of the reversion of the said lands and hereditaments so letten . . . . for any condition or covenant expressed in the indentures of their leases' as they might have had against their lessors. They cannot have any greater right or any more extended remedy. In the lifetime of the lessor the covenant was not a burthen on

(1) [1898] A. C. 370.

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the land in the hands of the lessor. After his death, how can it be a burthen on the land in the hands of the specific devisee? The appellants do not dispute that, if the covenant ran with the reversion, the specific devisees of Meadowbank came under liability to Mr. Bell. Whatever liability the statute threw on the specific devisees as assignees of the reversion, that they were bound to bear as between themselves and the lessee. But the testator's estate was also liable, and residuary legatees take nothing until the testator's liabilities are satisfied. If the liability for the breach of the covenant was not a charge on the inheritance, as Williams J. seems to have thought it was, why should the specific devisees bear it rather than the testator's estate, merely because for the protection of tenants the statute gives the lessee an additional remedy against the lessor's assignees?"

Pausing there, this covenant is, I think, one which would run with the reversion, but Lord Macnaghten points out that that fact is not sufficient to relieve the testator's general personal estate from bearing the burthen of his liabilities, and that the inquiry must go deeper. He says (1): "It would seem that the nature of the obligation in each particular case must determine the question. If it is in its nature incident to the relation of landlord and tenant, it would only be fair that the burthen should be borne by the devisee as between him and the testator's estate, falling on him as landlord, whether the agreement bears a seal or not. That seems to have been the principle of *Mansel* v. *Norton* (2), where it will be observed that there was no covenant to run with the reversion, though by some slip in the report the Master of the Rolls is made to say that there was. The lease was not under seal, and therefore the statute had no application."

Pausing there, it may be observed that the obligation in *Mansel* v. *Norton* (2) was an obligation on the part of the landlord to pay outgoings in respect of tenant rights. It did not arise under any express covenant, but was one attaching to and binding on the person who happened to be the landlord at the expiration of the tenancy. That was really the nature of the

(1) [1898] A. C. 371. (2) 22 Ch. D. 769.

obligation in that case, and that is what Lord Macnaghten means when he says (1): "The agreement there was that the lessor should buy the tenant's property at the end of the term; and it was held that as between the specific devisee and the testator's estate this obligation, incident as it plainly was to the relation of landlord and tenant, fell on the devisee."

Lord Macnaghten goes on (2): "On the other hand, if the covenant is not in its nature incident to the relation of landlord and tenant—if the thing to be done is something preparatory to the complete establishment of that relation, it would seem to be fair and in accordance with the probable wishes of the testator that the burthen of the covenant unperformed by him in his lifetime, should be borne by his estate rather than by his specific devisees. In the present case the object of the covenant was to ensure the premises being put into a condition fit for the occupation of the tenant under the lease. Such a covenant is intended to be performed forthwith, not to remain attendant on the lease during its currency. In its nature it seems to be very different from a covenant by the landlord to keep buildings on the demised land in repair, or to pay for unexhausted improvements at the end of the lease."

I ask myself, is the covenant in the present case one which within the meaning of Lord Macnaghten is incident to the relation of landlord and tenant, or is it intended to be performed forthwith, not to remain attendant on the lease during its currency? In my opinion it is one which was intended to be performed forthwith in accordance with the covenant, although no actual plan was in existence at the date of the execution of the lease. I think it is plain that the covenant was not one which the lessee might call upon the lessor to perform, say, six months before the expiration of the lease, but a covenant to put the premises into the condition which the lessee required them to be in for the purposes of his business. I think therefore that this covenant was not one in its nature incident to the relation of landlord and tenant, but one intended to ensure the premises being put into the condition stipulated by the lessee for the purposes of his occupation, and that on the authority of *Eccles* v.

(1) [1898] A. C. 371. (2) [1898] A. C. 372.

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Mills (1) alone, though *Marshall* v. *Holloway* (2) goes a long way in the same direction, this obligation is properly an obligation of the testator which must be primarily discharged out of his general estate, and I must make a declaration accordingly.

Solicitors: *Carthew, Wheeler & Hancock, for A. Ellis, Burslem; Bennett & Ferris; Taylor, Rowley, Lewis & Davis; Hind, Sons & Roberts.*

A. C.

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1913
July 24; *Oct.* 15.

In re DAVISON'S SETTLEMENT. CATTERMOLE DAVISON *v.* MUNBY.

[1913 D. 498.]

Marriage Settlement—Land—Limitation to Settlor for Life with ultimate Limitation to his "Heir-at-law"—Construction—Rule in Shelley's Case.

By her marriage settlement G. M. D. conveyed certain freehold and copyhold hereditaments to trustees to hold in trust for her during her life for her separate use, and after her death in trust for such person or persons and in such manner as she should by her will appoint, and in default of and until such appointment and so far as no such appointment should extend "in trust for the heir-at-law of the said G. M. D."

Held, that the rule in *Shelley's Case* (1581) 1 Rep. 93b, did not apply, and that under the limitations of the settlement Mrs. G. M. D. took an estate for life; the person who at her death answered the description of her heir-at-law took an estate for life, and there was a resulting trust in favour of Mrs. G. M. D. as settlor.

Clerk v. *Day* (1594) Cro. Eliz. 313, *Dubber* v. *Trollope* (1734) Amb. 453, and the dictum of Lindley L.J. in *Evans* v. *Evans* [1892] 2 Ch. 173, 186, considered.

POINT OF LAW.

By a settlement dated December 10, 1894, and made upon the marriage of Georgiana Mary Davison with her present husband, Augustine Benote Cattermole, who subsequently adopted the name of Davison as part of his surname, certain freehold and copyhold hereditaments in the county of York, the property of Mrs. G. M. Cattermole Davison, were conveyed to

(1) [1898] A. C. 360. (2) 5 Sim. 196.

trustees subject to certain incumbrances affecting parts thereof to hold the same to the trustees in fee simple to the use of Mrs. G. M. Cattermole Davison until the then intended marriage and after the same upon the trusts thereinafter declared. And it was thereby declared that after the solemnization of the said marriage the trustees should hold the premises upon the following trusts (namely), "In trust for the said Georgiana Mary Davison during her life for her separate use and after her death in trust for such person or persons and in suc manner as the said Georgiana Mary Davison by her will shall appoint and in default of and until such appointment and so far as no such appointment shall extend in trust for the heir-at-law of the said Georgiana Mary Davison."

The present action was brought by Mrs. G. M. Cattermole Davison against the trustees and her husband claiming that it might be determined whether on the true construction of the settlement (A) the plaintiff either (i.) with the consent of the trustees, or (ii.) without such consent, and, in either case, subject to any existing incumbrances, now had an absolute power by act inter vivos to dispose in such manner as she might think fit of all property now subject to the trusts of the settlement, or (B) the person who at the plaintiff's death should be her heir-at-law would take an estate for life or some other and what estate in such parts of the said property as the plaintiff should not have effectually disposed of under the testamentary power of appointment given to her by the settlement. There was also a claim for rectification of the settlement.

The point of law was now argued as a preliminary point.

John Beaumont, for the plaintiff. The point of law in this case is whether the rule in *Shelley's Case* (1) applies to the case of a gift to A. for life and after his death to his "heir-at-law" in the singular. If the heir-at-law is to be regarded as a persona designata he will, when ascertained, take a life estate only, if there are no words of limitation. The authorities stand in this way. In the case of an ultimate limitation to the heir in a will the word "heir" is construed as nomen collectivum and the rule

(1) 1 Rep. 93b.

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in *Shelley's Case* (1) applies. There are, however, certain dicta to be found in the authorities which seem to suggest that in the case of an ultimate limitation to the heir in a deed the word "heir" will be construed differently. The origin of the rule in *Shelley's Case* (1) is discussed in *Foxwell* v. *Van Grutten.* (2) The reasons for the rule are founded on public convenience and apply, it is submitted, as strongly to the case of a deed as to the case of a will. The origin of the suggestion that the word "heir" should be construed differently in the case of a deed and in that of a will is to be found in Co. Litt. 8b; but *Clerk* v. *Day* (3), *Dubber* v. *Trollope* (4), and *Fuller* v. *Chamier* (5) do not support this view. I rely on the dictum of Lindley L.J. in *Evans* v. *Evans* (6) to the effect that for the purposes of the application of the rule in *Shelley's Case* (1) the word "heir" or "heirs" will be sufficient whether in a will or in a deed. *Bayley* v. *Morris* (7) may be cited against me, but that case is distinguishable on the ground that it was one which clearly came within the decision in *Archer's Case.* (8) For the purpose of the application of the rule in *Shelley's Case* (1) it is immaterial whether the word "heir" or the words "heir-at-law" be used.

Edward Beaumont, for the defendant. I submit that the rule in *Shelley's Case* (1) does not apply in the present case. Such a bulwark as the difference between the use of the words "heir" and "heirs" ought not to be lightly shaken. The authorities in my favour are *Waker* v. *Snowe* (9); *Chambers* v. *Taylor* (10); *Bayley* v. *Morris* (7); Norton on Deeds, pp. 300, 329; Stroud's Judicial Dictionary, 2nd ed. vol. ii. p. 860; Tudor's Leading Cases on Real Property, 4th ed. p. 353; 16 Vin. Abr. 213, pl. 3. I rely very much on *Bayley* v. *Morris.* (11) The real ground of the decision in that case was, as stated by the Master of the Rolls, that "the words 'heir male' may be nomen collectivum: but in a deed such a construction cannot obtain. This must be

(1) 1 Rep. 93b.
(2) [1897] A. C. 658, 667.
(3) Cro. Eliz. 313; 1 Roll. Abr. 832, K. 1.
(4) Amb. 453, 456.
(5) (1866) L. R. 2 Eq. 682.
(6) [1892] 2 Ch. 173, 186.
(7) (1799) 4 Ves. 788.
(8) (1597) 1 Rep. 66b.
(9) (1622) Palm. 359.
(10) (1837) 2 My. & Cr. 376.
(11) 4 Ves. 794.

held as designatio personæ of the person, who should be heir male of the wife at the time of her death; and the true construction is, that it is an estate in fee to the person answering that description."

John Beaumont in reply. The authorities as far as they go are evenly divided and the Court will apply the rule in *Shelley's Case* (1) wherever possible: *Evans* v. *Evans*. (2) It cannot have been the intention of the parties that the heir-at-law of Mrs. Cattermole Davison, an unknown person, should take a life estate in the settled property. As to *Chambers* v. *Taylor* (3) the Lord Chancellor says that it was not argued that the parent took more than an estate for life, but according to the report (4) it was argued that the parent took an estate in tail male.

WARRINGTON J. The question in this case is whether under the limitations of a settlement made on December 10, 1894, the settlor, Georgiana Mary Davison (now Mrs. G. M. Cattermole Davison) takes an estate in fee simple in the hereditaments thereby settled. The limitation was a grant to trustees to the use of the settlor, her heirs and assigns, until the solemnization of the then intended marriage, and after the solemnization of the intended marriage in trust for the settlor for life for her separate use, and after her death in trust for such person or persons and in such manner as she by her will should appoint, and in default of and until such appointment, and so far as no such appointment shall extend, "in trust for the heir-at-law of the said Georgiana Mary Davison."

The question really is whether a limitation to A. and his heir (in the singular) creates an estate in fee simple. The rule in *Shelley's Case* (5), which is the rule with reference to which the question in the present case arises, is this: "It is a rule in law, when the ancestor by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is limited either mediately or immediately to his heirs in fee or in tail; that always in such cases, 'the heirs' are words of limitation of the estate, and not words of purchase." It seems to me that,

(1) 1 Rep. 93b.
(2) [1892] 2 Ch. 173, 187.
(3) 2 My. & Cr. 376, 386.
(4) Ibid. 382—384.
(5) 1 Rep. 93b, 104a.

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although in this case the fee simple, if taken at all, must be taken by virtue of the rule in *Shelley's Case* (1), still the same question arises as if it were simply a limitation to the first taker and his heir. I think, therefore, I am quite right in saying that the real question is, Is a grant by deed to A. and his heir-at-law sufficient to create an estate in fee simple? It is an extraordinary thing that such a question should arise at the present day, and that there should be so little distinct authority upon it as there is.

Now the authorities, such as there are in the case, seem to be against the contention. In the first place, the definition of a fee simple by Littleton (Co. Litt. 1a) is in these terms: "Tenant in fee simple is he which hath lands or tenements to hold to him and his heires for ever." Lord Coke's comment on that is (Co. Litt. 8b): "And it is to be observed, that every word of Littleton is worthy of observation. First (Heires) in the plurall number; for if a man give land to a man and his heire in the singular number, he hath but an estate for life, for his heire cannot take a fee simple by descent, because he is but one, and therefore in that case his heire shall take nothing." Now if there were nothing else, that would be absolutely plain, and there would be no room for any further argument, but in Mr. Hargrave's note to this passage in Coke on Littleton there is this statement: "According to many authorities, *heir* may be nomen collectivum, as well in a deed as a will, and operate in both in the same manner as *heirs* in the *plural* number." Then he cites amongst others a case in Cro. Eliz., and some passages in Rolle's Abridgment. Now the case in Cro. Eliz. is reported as *Clerk* v. *Day*. (2) It was a case decided before Lord Coke wrote his commentary on Littleton, at the time when he himself was Solicitor-General. The case as stated in the report is this: "The case upon special verdict was, Joan Marsh devised"—it was therefore the case of a will—"certain land to Rose her daughter for life; and, 'if she marry after my death, and have *heir* of her body, then I will that *the heir*, after my daughter's death, shall have the land, and to the heirs of their body begotten; and if my daughter die without

(1) 1 Rep. 93b. (2) Cro. Eliz. 313.

issue of her body begotten, then Philip Taylor shall have it to him and his heirs.' Joan Marsh died. Rose married Silly, and had issue. The question was, If Rose had an estate in tail, or for life only? First, It was agreed by all the justices, that a devise to one and the heir of his body, is an estate tail, and shall go to all the heirs of her body; for 'heir' is nomen collectivum, and one can have but one heir at one time, and this shall go from heir to heir; but Gawdy and Fenner held, that Rose had but an estate for life, for so it is limited by express words, that she shall have for life, and then her heir shall take as a purchaser, and it shall not execute in Rose. Popham, *Chief Justice, contra,* for the estate is limited to the ancestor, and after limited to the heir, and shall execute in the ancestor, especially the words being, 'if she hath any heirs,' and therefore intended that any heir shall have it." There is a note at the foot of the case, which note is taken from Parker C.B.'s manuscript: "Lord Raymond inspected the roll of this case (the true name of which is *Cheat* v. *Day.* See 2 Stra. 804) and that the devise was: 'If she marry after my death, and have any heir of her body then lawfully begotten, I will that that heir after my daughter's death shall have the land, &c." Now I think that is certainly an authority, and there are plenty of others, that in the case of a will, as Mr. Hargrave says, "heir" may be nomen collectivum, and may operate in the same manner as "heirs," in the plural number; but it is not an authority for the statement that it may so operate in a deed as in a will. Another authority referred to by Mr. Hargrave is a passage in 1 Roll. Abr. 832, K. 1. Now that so far as it stands is an authority, if an authority at all, for the statement that the word "heir" in the singular may create an estate in fee simple in a deed. The passage in Rolle's Abridgment runs thus: "Si home done terre"—there "done" means by an instrument inter vivos—"al auter et son heir, ceo est un fee en le donee, car le paroll heir est nomen collectivum et extend a l'heir in infinitum," and *Clerk* v. *Day* (1), sub nom. *Clark and Daye's Case,* per Popham and Fenner, is cited. Then, curiously enough, this paragraph immediately follows it:

(1) Cro. Eliz. 313.

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"Meme la ley esset d'un devise en tiel manner; come fuit tenus per eux." One would have thought that to be perfectly accurate the second statement should have been put first, because what the judges in that case really held was that in the case of a devise the word "heir" in the singular might create an estate in fee simple. It is not accurate to say on the authority of that case of *Clerk* v. *Day* (1) that such words would create a fee simple in an instrument inter vivos. So that I think when it comes to be examined the statement in Rolle's Abridgment is no authority for the wide statement made by Mr. Hargrave in his note. Of course it is possible that in the case of a deed the words of the deed may be such as to shew that the word "heir" is used as nomen collectivum, and I think that is really what is meant by the passage in the judgment of Lindley L.J. in *Evans* v. *Evans* (2), where he says: "I take the rule to be that if in any instrument the word 'heir,' or the word 'heirs,' or the two words combined, are used in the sense of all the heirs of a person who under the same instrument takes a life estate in real property, and no other heirs, the property given to the heir or heirs of the first taker is in point of law given to him, although it is in terms given to him for life only." I think what Lindley L.J. really means is that you may find in a deed some expression that the word "heir" is used as nomen collectivum. In the present case I have no context and nothing which explains the use of the word.

There is some further authority which has been relied upon, and to that I must now refer. The strongest case of all is *Dubber* v. *Trollope*. (3) That was the case of a will. The limitation there was to Thomas Trollope, the second son of the testator, to whom the estate was appointed in these words: "To my son Thomas Trollope for the term of his natural life, and after to the first heir male of his body lawfully begotten; and for want of such heir male, to be and remain to Christopher." Eyre C.J. in giving judgment says: "What effect a devise to a man and the heir male of his body will have?"—that is the first point—"and whether it will give the devisee an estate for life, or

(1) Cro. Eliz. 313. (2) [1892] 2 Ch. 173, 186.
(3) Amb. 453, 456.

in tail?" Then comes a very important sentence: "How this matter would have stood if the limitation had been in a deed, is not our affair at present to determine, because we are now upon the construction of a will. But since the reasoning upon the words '*heir male*,' in the singular number, in the case of a deed, hath been thought proper and of weight in the case of a will, it will be necessary to take notice of the books which have been cited in the case of a deed." Then he refers to the passage in Co. Litt. 8b, and he makes this remark: "But this seems to be answered even in this book, 1 Inst. fo. 20. where it is said, that though Littleton saith *heirs*, yet *heir* in the singular number in a special case may create an estate tail; as appears by 39 Ass. 20. 1 Inst. 22, where Coke says, That of all the estates tail most corrected and restrained, that I find in our Books, is the estate tail 39 Ass. 20. where lands were given to a man and to his wife, and to one heir of their bodies lawfully begotten, and to one heir of that heir only; which he agrees to be an estate tail: which seems to contradict his former opinion, in a stronger instance than he had before put. The former instance was of a gift to a man and his heir male in the singular number; and however it may be construed to give the estate a descendible quality, to every heir one after another, when there is nothing particular to restrain it to one heir only, yet when it is limited after the decease of the grantee or donee, as in 39 Ass. 20. to the first and second heir only, it is a plain declaration of the donor, that it shall go no further, and in such a restriction as seems to deprive it of the quality which is the true description of an estate of inheritance, viz. that it is an estate descendible to all generations: and therefore this of 39 Ass. 20. can never be an estate tail, unless a grant to a man and one heir male, or a grant to a man and his heir male in the singular number, will make it so. And therefore one would think that the words *heir male* in the singular number should give the estate a descendible quality, and make it inheritable. And it does not appear, that Littleton ever intended to say otherwise; for he was not considering, whether the word *heir* in the singular number, was equivalent to *heirs* in the plural; and was only saying, that the words '*for ever*' alone, as a grant to a man 'for ever,' would

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not create an inheritable estate: for it must be said, *who* shall take and enjoy this estate '*for ever*'? And to establish this as a rule of law, he says, that the word '*heirs*' only can make an estate of inheritance in feoffments and grants: and one can hardly suppose that the case of the word '*heir*' in the singular number was then thought of, or that he intended to say, that it should not be taken collectively, and should mean but one heir only. And the reason given by Lord Coke, 1 Inst. 8b, that the heir should take nothing because he was but one, is by no means convincing, and can never hold, when it is considered that there can be but one heir at one time: for heirs are to take one after another, in a course of descent; and there can be but one heir at once. And there is also a considerable authority, Reg. Jud. 6. to this purpose, where there is a *sci. fa.* brought by an issue male to execute a fine of lands granted to his father, and hæredi masculo de corpore suo procreato; and there is no resolution of any Book or Court to the contrary, except in *Shelley's* Case 104, which was only arguendo." Then he proceeds to say, "But however it may stand upon a feoffment or grant, yet it can never be imagined, that the word *heirs* is necessary to make an estate of inheritance in the case of a devise." Then he deals with the case of a devise, which is not the case that I have to deal with, and he holds that the devise in that case amounted to a devise in tail male to Thomas Trollope. No doubt that argument of Eyre C.J. is intended to be a criticism on the statement contained in Co. Litt., but in Co. Litt. there is that distinct statement of Lord Coke of what he conceives the law to be with regard to the technical requirements of an estate in fee simple, and there is no decision that I can find in the case of a deed which overrules that. So far as the authorities go, they are the other way, and in particular I must refer to *Bayley* v. *Morris* (1), which was the case of a deed. The Master of the Rolls there said: "I will not decide, what would have been the construction of such words, if they had occurred in a will. The words '*heir male*' may be nomen collectivum: but in a deed such a construction cannot obtain." Then he goes on to hold that in the case before him the words in question pointed

(1) 4 Ves. 788, 794.

to a particular person. There in a marriage settlement after life estates to the husband and wife a remainder was limited to the heir male of her body by him to be begotten, and to his heirs. That was held to be not a limitation to the first taker, but a limitation to the heir male in fee simple.

It is unnecessary to go through any more authorities. I think the real position is this, that there is that distinct statement in Coke upon Littleton as to the words necessary in a deed to create a fee simple. There is no clear authority of any case arising on a deed in which it has been held that those requirements are unnecessary. I think, therefore, in the present case that, there being only a limitation to the first taker for life with remainder after power of appointment to her heir-at-law, I must hold that there is a limitation to the heir-at-law who would take by purchase, and of course, there being no superadded words of limitation, the heir-at-law would by purchase take a life estate only, and there would be a resulting use to the settlor. I therefore make an order in the terms of paragraph (B) of the prayer in the statement of claim, and the rest of the action will stand over.

Note.—On October 15 the action came on for trial before Warrington J. His Lordship held upon the evidence that no ground was shewn for rectifying the settlement and dismissed the action.

Solicitors for all parties: *Munby & Sparkes.*

W. I. C.

WARRINGTON J.
1913
July 29.

In re SHERRY.
SHERRY *v.* SHERRY.

[1913 S. 1988.]

Tenant for Life and Remainderman—Will—Trust for Conversion—Power to postpone—Residue—Estate pur autre vie—Policies on Life of Cestui que vie—Premiums, whether payable out of Capital.

Testator devised and bequeathed his residuary real and personal estate to trustees upon trust to sell and convert and to pay the income of the proceeds to his wife for life or during widowhood and after her death or remarriage to divide his estate into six equal parts which he settled upon his six children for life with remainder to their respective children absolutely with power for his trustees to retain his estate in its then state of investment unless directed by his wife to sell and with a proviso that until such sale the income of his estate should be paid to the persons to whom the income of the proceeds of his residuary estate would for the time being be payable. The testator's estate included an estate pur autre vie in certain funds which produced about 244*l.* a year and two policies of assurance for 1000*l.* and 750*l.* respectively, the annual premiums on which amounted to about 60*l.* The cestui que vie had disappeared some years ago and his whereabouts was not known:—

Held, that the trustees were entitled to postpone the sale both of the life interest and the policies, and that the premiums on the policies were payable out of capital.

In re Bennett [1896] 1 Ch. 778, 787, followed.

Adjourned Summons.

Henry Sacheverel Sherry, by his will dated March 12, 1895, after bequeathing the furniture in his house called "Dynmore" to his wife, devised and bequeathed his said house, land and stable, and also all his property whatsoever and wheresoever and of what nature or kind soever, securities for money, and all his other effects except furniture in his house to his trustees and executors in trust at their absolute discretion or at the discretion of his wife to sell the same when convenient and to invest the proceeds in trustees' securities and to pay the income of all his property to his wife for her life or during widowhood, and on her death or in the event of her marrying again he bequeathed all his said property absolutely to his children to be divided between them, share and share alike.

By a first codicil to his will dated April 8, 1906, he revoked the bequest of the capital to his children and directed that after the death or remarriage of his wife his trustees should divide his estate into six equal parts, and he settled one of such sixth parts on each of his six children for life with remainder to their respective children absolutely.

By a second codicil to his will dated August 6, 1912, he made the following declaration: "I declare that my trustees may permit the whole or any part of my personal estate (including leaseholds or other property of a perishable or wearing out nature and all other investments of mine including my freehold house called 'Dynmore' and my freehold ground rents) to remain in the state of investment in which they shall be at the time of my death for so long as they shall think fit and that the rents and profits and income to accrue from and after my decease of and from such property and investments shall be paid and applied to the person or persons and in the manner to whom and in which the income of the proceeds of my said residuary estate would for the time being be payable." Then after making other provisions the testator gave a special power to his trustees to postpone the sale of his house called "Dynmore," his freehold ground rents at Fulham, and other investments until the death of his wife or until such time as might be convenient or until desired to sell by his wife.

The testator died on March 3, 1913.

At his death part of his estate consisted of an equal fourth share of the net income during the life of one B. A. T. Harwood of the funds forming part of the residuary estate of Colonel Edward Harwood, deceased. This life interest was originally mortgaged by B. A. T. Harwood to the testator together with a policy on Harwood's life for 1000*l.* In 1898 the testator purchased the equity of redemption and took an assignment of the life interest and the policy. At a later date the testator effected a further policy for 750*l.* on the same life. The annual premiums on these policies amounted to 60*l.* 17*s.* 6*d.* The surrender value of the two policies was 380*l.* The annual income of the life estate was 244*l.* 10*s.* 6*d.*

The cestui que vie was about sixty-one years of age. He

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had disappeared some years ago and his whereabouts was unknown; but he was believed to be in America.

Under these circumstances the trustees took out the present summons for the determination (inter alia) of the questions (1.) whether under the provisions of the will and codicils the testator's widow was entitled during her widowhood to the whole of the instalment as it accrued due arising in respect of the Harwood property or whether any and if so what part of such instalment ought to be treated as capital of the testator's estate; (2.) how provision ought to be made for the payment of the annual premiums on the policies of insurance on the life of B. A. T. Harwood and how the incidence of such payment ought to be borne as between the beneficiaries under the will and codicils; and (3.) whether the trustees had power to retain the life interest of B. A. T. Harwood and the said policies unconverted or whether the same respectively ought to be sold and surrendered or how otherwise the same respectively ought to be dealt with.

Nicholson Combe, for the summons.

H. L. Manby, for the testator's grandchildren who were interested in the capital. Having regard to the very wide terms of the power to postpone I cannot contend that the trustees have not power to postpone the sale both of the life interest and the policies; but they are not exercising the discretion given to them by the will and codicils, but are coming to the Court for directions, and it is submitted that the rule in *Howe* v. *Earl of Dartmouth* (1) applies. In *Rowlls* v. *Bebb* (2) the Court came to the conclusion that the trustees had never exercised the discretion as to the conversion of the reversionary interest.

[WARRINGTON J. In that case there was no reason for retaining the reversionary interest unsold.]

[He also referred on this point to *Mackie* v. *Mackie* (3) and *In re Pitcairn*. (4)]

As regards the policies, it is submitted that the premiums ought to be paid out of income. Where the property is, as here, part of residue the tenant for life takes the whole of it for better

(1) (1802) 7 Ves. 137a.
(2) [1900] 2 Ch. 107.
(3) (1845) 5 Hare, 70.
(4) [1896] 2 Ch. 199.

or worse. If the tenant for life in the present case takes the income of the life interest it is only fair that she should pay the premiums on the policies out of it.

W. F. Swords (*L. Mossop* with him), for the widow, the tenant for life. The policies are being kept up for the benefit of the estate.

[WARRINGTON J. They are in the nature of reversionary interests.]

The premiums are part of the costs, charges, and expenses incurred by the trustees in the administration of the estate and are properly payable out of capital: *In re Bennett.* (1)

M. J. L. Beebee, for the testator's children, the tenants for life in remainder, submitted that the premiums on the policies were payable out of income.

WARRINGTON J. The main question in this case is whether the trustees have a discretion and may properly exercise it by retaining unsold a certain estate pur autre vie and certain policies of assurance effected on the life of the cestui que vie. The facts are these: [His Lordship stated them and continued:] The trustees are in this position. The cestui que vie disappeared some years ago and is not in touch with the Harwood trustees. He is believed to be in America. The Harwood trustees continue to pay the income to the trustees of the testator's will, who pay it to the testator's widow. Can the trustees of the will properly postpone the sale of the life interest of the cestui que vie? If they have power to do so on the true construction of the will and codicils, and if they can in the circumstances properly exercise that power, they are prepared to exercise it by retaining the life interest unconverted. The testator has given the trustees the fullest power to postpone the sale, and they feel a difficulty about converting. They think that to sell the life estate would be ruinous, as they are not at present in a position to satisfy a purchaser that the life has not dropped. The cestui que vie is supposed to be sixty-one years of age. The policies on his death will produce 1750*l.*, which will form part of the testator's estate. In these circumstances I think the trustees have power to

(1) [1896] 1 Ch. 778, 787.

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postpone the realization both of the life interest and the policies and I will so declare.

The widow being entitled under the provisions of the second codicil to the income actually produced by the testator's estate is entitled to the whole of the income of this life interest which is quite securely invested without the policies. The life policies are reversionary interests and must be treated quite separately from the life interest of the cestui que vie. The premiums on the policies are paid for the preservation of an item of the testator's property, the benefit of which goes to capital. I think, therefore, that in this case, as in *In re Bennett* (1), the premiums may properly be paid by the trustees as part of their costs, charges, and expenses in the administration of the estate and are properly payable out of capital.

I therefore answer question 3 of the summons by declaring that the trustees have power to retain the Harwood life interest and policies unconverted, and question 1 by declaring that the widow is entitled to the whole of the income derived from the life interest, and question 2 by declaring that the premiums ought to be borne by the capital of the testator's estate.

Solicitors for all parties: *Greville, Evans & Sherry.*

(1) [1896] 1 Ch. 778, 787.

W. I. C.

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[1912 S. 3352.]

Injunction—Breach of Covenant—Building Scheme—Alteration in Character of District.

In 1888, S., the owner of a considerable estate called the B. M. Estate, lying on the south side only of C. Road, conveyed to a building society three acres of the land bounded by C. Road on the north (below called the second S. Estate). The land was coloured pink on the plan on the conveyance, which divided it by lines into eighteen equal-sized plots having the odd numbers on the C. Road frontage and the even numbers on the south. The plan also shewed another piece of land coloured green, which belonged to S. but was not conveyed. The deed contained a covenant by the society against the erection or user of buildings on the second S. Estate other than as private dwelling-houses, professional premises, or lodging-houses. S. by the same deed entered into a similar restrictive covenant as regarded the land coloured green. Other parts of the B. M. Estate lying to the west and south-west of the second S. Estate (below called the first S. Estate) had been previously purchased by the society, which later on purchased other land forming part of the B. M. Estate, including the land coloured green (collectively called the third S. Estate).

In 1889 the society conveyed a plot on the second S. Estate (No. 11, facing north) and another plot (No. 12, facing south) to G., who in 1912 conveyed them both to the defendant. The unsold portions of the B. M. Estate were in 1911 conveyed by the successor in title of S. to the plaintiff.

In and for some time after 1888 C. Road was a quiet country road with a few houses on either side, and for some distance west of the second S. Estate, and along the whole frontage of that estate and of the land coloured green the district was purely residential. From 1888 onwards this character had been seriously altered. On the north side of C. Road there was an almost continuous line of shops opposite the second S. Estate, and C. Road itself had become the main shopping district of the place. Many shops had also been built on adjoining parts of the B. M. Estate which had formerly been subject to restrictive covenants, and the covenants in respect of several plots on the second S. Estate had not been enforced, with the result that private houses on them had been turned into shops. The plaintiff himself had erected shops on parts of his neighbouring land.

In 1912 the defendant, being desirous of building shops on his plots, applied to the plaintiff for leave to do so. This was refused except on the terms of the defendant paying plaintiff 100*l*. On these terms being

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declined the plaintiff sued for an injunction to restrain the defendant from erecting the shops:—

Held, (1.) that as between S. and the society the conveyance provided for a building scheme; (2.) that the acts and omissions of the plaintiff and his predecessors in title, and particularly the non-enforcement of the covenant as to the building on parts of the second S. Estate, prevented the Court from enforcing the covenant; and (3.) that, if that was not enough, the Court was entitled also to take into account the general change in the character of the neighbourhood irrespective of the particular acts and omissions of the plaintiff and his predecessors in title.

Observations of James L.J. in *German* v. *Chapman* (1877) 7 Ch. D. 271, 279, and of Lindley L.J. in *Knight* v. *Simmonds* [1896] 2 Ch. 294, 297, 298, applied.

At the date of the indenture next below referred to Sir Percy F. Shelley was seised in fee simple of lands of considerable extent then in the county of Southampton, but at the date of this action within the county borough of Bournemouth, known as the Boscombe Manor Estate, including the land comprised in that indenture.

These lands abutted on Christchurch Road, Bournemouth, and lay exclusively to the south of that road.

By an indenture dated November 13, 1888, Sir P. F. Shelley conveyed to the Boscombe Conservative Co-operative Land and Building Society, Limited, in fee simple a part of the Boscombe Manor Estate, then described as situate at Boscombe, containing about three acres and thirteen perches, and bounded on the north by Christchurch Road (the high road leading from Bournemouth to Christchurch). The land conveyed was of rectangular shape, and a plan on the deed shewed that it fronted on the south on a new road called Hawkwood Road and on the east on a new road called Heathcote Road. On the west the land conveyed was about 335 feet from Sea Road, and was separated from that road by land belonging to persons claiming under a conveyance previously made by Sir P. F. Shelley. The plan shewed, by lines drawn across the site, the land as divided into eighteen equally-sized plots, of which nine fronted on Christchurch Road and nine on Hawkwood Road. The deed contained the following covenant (immediately following the habendum): "And the society covenant for themselves, their successors and assigns (to the

intent that the covenants hereinafter on their part contained may for ever hereafter be binding not only on the society but also so far as practicable on all persons claiming title under the society to the land hereby conveyed or any part thereof and to bind such land into whosesoever hands the same may come) do hereby covenant with the vendor his heirs or assigns or other the owner or owners for the time being of the said Boscombe Manor Estate or any part thereof that the society, their successors or assigns will not erect or suffer to be erected on the hereditaments hereby conveyed any buildings other than private dwelling-houses with stables and buildings appurtenant thereto of not less value in first cost of material and labour (exclusive of stables and buildings) than 500*l.* for each dwelling-house if detached or 800*l.* the pair if in pairs, and will not use any such building or permit any such building to be used except for the purposes aforesaid or for the purpose of carrying on the profession of a surgeon or physician or the business of a lodging-house-keeper; And will not erect or permit to remain on the hereditaments, hereby conveyed any hut, caravan, shed, house-on-wheels, booth, show, swing or roundabout; and that for the period of ten years from the date hereof the society, their successors and assigns, before commencing to build on any part of the said hereditaments, shall submit the plans of the proposed building to the vendor or his solicitor for the time being for his approval, and such approval shall not be unreasonably withheld, the object of this covenant being to provide suitable and well planned houses for the health and comfort of the occupants and to ensure in some degree the uniformity of elevation."

The land so conveyed, which on the plan was coloured pink, was referred to during the trial of the action as "the second Shelley Estate"; a large area of land to the west and south-west, previously purchased by the society from Sir P. F. Shelley, was called "the first Shelley Estate"; and land to the east, comprising a piece of land coloured green on the plan and other lands, all purchased by the society from the same vendor, were collectively called "the third Shelley Estate."

The deed of 1888 also contained the following covenant: "And the vendor, for himself and his assigns (to the intent that the

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covenant hereinafter on his part contained may for ever hereafter be binding not only on the vendor but also, so far as practicable, on all persons claiming title under him to the plot of land hereinafter described adjoining the hereditaments hereby conveyed on the eastward side (1), or any part thereof, and to bind such plot into whosesoever hands the same may come) doth hereby covenant with the society, their successors or assigns, or other the owner or owners for the time being of the said hereditaments hereby conveyed or any part thereof, that he the vendor his heirs or assigns will not erect or suffer to be erected on" the plot coloured green "or on any part thereof any other building than a private dwelling-house, with stables and outbuildings appurtenant thereto, and will not use any such building or permit any such building to be used except for the purposes aforesaid or for the purpose of carrying on the profession of a surgeon or physician or the business of a lodging-house keeper."

On January 24, 1889, the society conveyed two of the plots forming part of the second Shelley Estate to one Gould, who on July 8, 1912, conveyed them to John James Sainsbury, the defendant in the present action.

Sir P. F. Shelley died on December 5, 1889, and under his will the fee simple in the Boscombe Manor Estate vested in his widow. She died on June 24, 1899, and under her will the unsold portions of that estate passed to Lord Abinger, who, by an indenture dated June 26, 1911, conveyed the unsold portions of the estate (containing about seventy-six acres) to Richard Thomas Sobey in fee.

Christchurch Road is the main road from Bournemouth on the west, through Boscombe, towards Poole, on the east, and in 1888 and until a comparatively recent time it was a quiet country road, with a few houses on either side. In 1888 there were no shops in Christchurch Road east of Palmerston Road on the north and Sea Road on the south. Between Sea Road (on the west) and the most westerly part of the second Shelley Estate there were on the south frontage of Christchurch Road (1.) a private house then called "Winterslow" and afterwards "Theydon

(1) The two plots were really separated by Heathcote Road.

Lodge," (2.) a detached house called "Weybourne," (3.) a semi-detached house called "Farnworth," and (4.) a semi-detached house called "Smedmore," the last three being under long leases to Messrs. Hoare & Waldon. Then, going east, there was the frontage of about 208 feet of the first Shelley Estate, which had been sold to the society without any restriction as to shops, but on which private residences had been erected, so that for some distance to the west of the second Shelley Estate, and throughout the whole frontage of that estate and of the land coloured green to the east of it, there was nothing to interfere with the purely residential character of the district.

Between 1888 and the commencement of the action there was an enormous increase in the population of Boscombe, with a corresponding change in the character of Christchurch Road, its main artery, and the residential character of the district was seriously altered. On the north side of this part of Christchurch Road in about 1890 an hotel was erected; an arcade, a theatre, and lock-up shops, with an assembly-room and library over them, quickly followed; in about 1893 some twelve shops were built at the west corner of Ashley Road (which ran north from Christchurch Road opposite the northerly end of Heathcote Road), and the intervening space was quickly filled up with shops into which private houses had been turned.

For many years before the action there had, with the exception of a small pair of semi-detached villas, been one continuous line of shops on the north side of Christchurch Road, opposite the full length of the second Shelley Estate and for a considerable distance to the east. As to the south side of Christchurch Road, in 1893 Lady Shelley sold the reversion in fee of Weybourne, Farnworth, and Smedmore to the lessees, without keeping them under any restrictive covenants, and, further, assured to them the benefit of the restrictive covenants entered into by the grantee of Theydon Lodge in such a form as to render it easy for them to arrange with him to release those covenants. Shortly afterwards a bank was built at the corner of Christchurch Road and Sea Road (west of the second Shelley Estate); a terrace of shops was built in Sea Road; a row of shops was built on the Christchurch Road frontage of Weybourne,

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Farnworth, and Smedmore; and the private houses on the Christchurch Road frontage of the first Shelley Estate were turned into shops. As regards the Christchurch Road frontage of the second Shelley Estate, what occurred was as follows: On one plot a private house was built in 1893, but in 1910 the owner turned it into one large shop and two lock-up shops. On the next plot a private house, named "Rivoli," was built and remained, but unoccupied except by notices to the effect that it was to be turned into shop property to suit applicants. A strip on the west side of the curtilage of this house was in 1911 occupied as a site for a lock-up shop. The next plot was vacant until 1909, when part of it was conveyed to the Bournemouth Corporation for the purposes of a public library, and the library had since been built. On the next plot a large house was built, but at the time of the action it had been long unoccupied except by notices similar to those on Rivoli. On the next plot there was a large post-office, erected in about 1911. The next plot was the land purchased by Sainsbury, the defendant. On the next plot a private house, now used as a Gordon Boys' Home, was built, and the remaining two plots on the frontage were private residences occupied by medical men.

No breach had occurred of the vendor's covenants with reference to the land coloured green, but one house on it was occupied as a residence for trained nurses. Further to the east, both on the Christchurch Road frontage of the part of the Boscombe Manor Estate purchased by Sobey, the plaintiff, and on other property purchased by him, Sobey was erecting and proposing to erect terraces of shops.

At the time of the action electric tramcars ran at frequent intervals and the part of Christchurch Road in question had become the main shopping district of Boscombe.

The defendant Sainsbury, being desirous of erecting a shop on his plot on the second Shelley Estate fronting on Christchurch Road, in 1912 applied to Sobey to allow this to be done. Sobey refused permission except on the terms of the payment to him of 100*l.* Sainsbury refused to pay this sum and proceeded to erect his shop, and Sobey accordingly brought the present action against Sainsbury.

The plaintiff claimed an injunction restraining the defendant, his servants, agents, and workmen, from erecting or suffering to be erected on his two plots of land on the south side of Christchurch Road, or any part thereof, any buildings, other than private dwelling-houses with stables and buildings appurtenant thereto of not less value than the amounts specified in the covenant in the deed of 1888, and from using any such building or permitting any such building to be used except for the purposes aforesaid or for the purpose of carrying on the profession of a surgeon or physician or the business of a lodging-house keeper; and damages.

The defence set up by the defendant was that there had been such a change in the general character of the neighbourhood that the object for which the covenant was entered into had completely disappeared, and that this change had to a great extent been brought about by the acts and omissions of the plaintiff and his predecessors in title.

The action was tried by Sargant J. on July 28, 29, 30, and 31, 1913.

Younger, K.C., *A. Grant, K.C.*, and *Owen Thompson*, for the plaintiff. If there has been any change in the neighbourhood, it is due to what has been done on the north side of Christchurch Road, which is not part of this property, and to the tramways, for none of which matters are we responsible. The defendant may rely on *Duke of Bedford* v. *Trustees of the British Museum* (1), but that case only establishes that where there is a covenant by one person with another, who is an adjoining landowner, not to use the covenantor's land in a certain way, with a view to the covenantee's better enjoyment of his own land, and the covenantee, before action brought, does something which prevents the covenant being worth anything, a Court of Equity will not enforce the covenant; it is an authority only in a case where a covenantee has by his own acts altered the character of the property. Referring to the case in *Sayers* v. *Collyer* (2), Bowen L.J. said: "It was decided on equitable grounds that in such a case there would be an equity against the plaintiff

(1) (1822) 2 My. & K. 552. (2) (1884) 28 Ch. D. 103, 108.

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which would bar that particular relief"—enforcement by injunction. "In the present case we do not decide that a mere alteration in the character of the neighbourhood would be sufficient; because there is no evidence that such alteration was caused by the plaintiff." And in the same case (1) Fry L.J. says that the rule in *Duke of Bedford* v. *Trustees of the British Museum* (2) "applies where an alteration takes place through the acts or permission of the plaintiff, or those under whom he claims, so that his enforcing his covenant becomes unreasonable. But I do not think that it applies to cases where the change which has taken place was beyond the control and independent of the action of the plaintiff." *Craig* v. *Greer* (3) and *Osborne* v. *Bradley* (4) shew that alteration in the character of a neighbourhood is no defence unless it is shewn by the existence of a building scheme or otherwise that the object of the covenant was either to secure the common advantage of purchasers, or to protect other property of the covenantee, and that he has by his own acts or acquiescence made the attainment of that object impossible.

On the deed of November 13, 1888, there was not, as between Sir P. F. Shelley, the plaintiff's predecessor in title, and the society, the defendant's predecessor in title, any building scheme at all, for the property was conveyed in one piece to one purchaser, and therefore the breach of a covenant in that deed would not affect the right to have restrained the breach of a restrictive covenant in a building scheme subsequently entered into.

Peterson, K.C., Romer, K.C., and *Bryan Farrer*, for the defendant. It cannot be disputed that the character of the neighbourhood has materially altered or that the alteration has been largely brought about by the acts of the plaintiff and his predecessors in title. In those circumstances it is clear that an injunction ought not to be granted.

In every instance in which the covenantee suffers covenantors or those claiming under them to deviate from a general plan intended for the benefit of all, he deprives the others of the right

(1) 28 Ch. D. 109.
(2) 2 My. & K. 552.
(3) [1899] 1 I. R. 258.
(4) [1903] 2 Ch. 446.

given to them to have the general plan enforced for the benefit of all, and the Court will not help him against those others by injunction: *Roper* v. *Williams* (1); *Peek* v. *Matthews*. (2) Irrespective of the turning of residences into shops, there have been other acts which constituted breaches of the covenant: *German* v. *Chapman*. (3) The object of the covenant must be looked at. That object is the preservation of the property as a residential one, and if that can be no longer attained an injunction will not be granted: *Knight* v. *Simmonds*. (4) In that case Lindley L.J. says (5): "Before granting equitable relief, Courts of Equity look not only to the words of a covenant, but to the object to attain which it was entered into, and if, owing to circumstances which have occurred since it was entered into, that object cannot be attained, equitable relief will be refused . . . . whatever the explanation of the altered state of things may be, if the object to be attained by the covenant cannot be attained, equitable relief to enforce it will be refused."

[SARGANT J. referred to *Spicer* v. *Martin*. (6)]

The conveyance to the building society constituted a building scheme. The land was divided into plots as shewn in the plan, and the intention was perfectly clear. No damage has been shewn, and under Lord Cairns' Act, 21 & 22 Vict. c. 27, damages cannot be given unless the plaintiff establishes a case for an injunction.

Younger, *K.C.*, in reply. The only defence is the change in the character of the neighbourhood. The defendant's object is not to convert his property to useful purposes, but to escape from an inconvenient fetter in order to obtain profit by turning this house into business premises. The plaintiff must shew that he is entitled to an injunction, but he will forgo that if the defendant will pay him 100*l*. The defendant cannot say he is relieved from the burden of his covenant without saying that the owners of all the other plots are relieved.

[SARGANT J. In the case of a large estate might not people at one end say they were relieved although those at the other end could not say so?]

(1) (1822) T. & R. 18.
(2) (1867) L. R. 3 Eq. 515.
(3) 7 Ch. D. 271.
(4) [1896] 2 Ch. 294.
(5) [1896] 2 Ch. 297, 298.
(6) (1888) 14 App. Cas. 12, 24, 25.

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This is only a small estate. It is not necessary for the plaintiff to prove substantial damage in order to entitle himself to an injunction: *Elliston* v. *Reacher*. (1)

Allowing mere trivial departures from a building scheme is not sufficient to destroy the whole benefit of the covenants as to all the rest of the estate: *Knight* v. *Simmonds*. (2)

But there is no building scheme here in the deed of 1888. There was not a sale of plots, but a sale of one piece of land to one purchaser. The plots marked on the plan were not numbered.

SARGANT J. This is an action for the enforcement of a restrictive covenant contained in an indenture dated November 13, 1888, whereby Sir Percy Shelley (who was the owner of a considerable estate at Bournemouth, abutting on the Christchurch Road, but lying exclusively to the south of that road, and known as the Boscombe Manor Estate) conveyed to the Boscombe Conservative Co-operative Land and Building Society, Limited (hereinafter called the Boscombe Building Society), a considerable parcel of land, of something over three acres. The land so conveyed was of rectangular shape, and was shewn on a plan on the conveyance as fronting on the north on the Christchurch Road, and on the south on a parallel new road called Hawkwood Road, and on the east by a new road called Heathcote Road. On the west it is some 335 feet from a road called Sea Road, and is separated therefrom by land belonging to persons who, in fact, claimed under a conveyance previously made by Sir Percy Shelley. The land was also shewn as divided into eighteen equal-sized plots, nine fronting on Christchurch Road and nine on Hawkwood Road. These plots have for convenience been numbered from west to east, as to those facing on Christchurch Road by the odd numbers 1 to 17 inclusive, and as to those fronting on Hawkwood Road by the even numbers 2 to 18 inclusive. They are all coloured pink on the plan. There is coloured green on the plan, to the east of the land coloured pink, a piece of land of the same depth from north to south, and of approximately the same size, lying between the Heathcote Road on the west and the Crabton Close

(1) [1908] 2 Ch. 374, 395. (2) [1896] 2 Ch. 294, 299.

Road on the east. The land coloured pink has been often referred to as the second Shelley Estate, the Boscombe Building Society having previously purchased from Sir Percy Shelley a large area of land to the west and south-west of the land coloured pink, which is often referred to as the first Shelley Estate, and subsequently purchasing from the same vendor land collectively called the third Shelley Estate, which comprised the green land and other land to the south and south-east of the land coloured pink. The covenant in the conveyance of November 13, 1888, which is now sought to be enforced, is in the following terms: "And the society for themselves, their successors and assigns (to the intent that the covenants hereinafter on their part contained may for ever hereafter be binding not only on the society but also, so far as practicable, on all persons claiming title under the society to the land hereby conveyed or any part thereof and to bind such land into whosesoever hands the same may come) do hereby covenant with the vendor, his heirs and assigns or other the owner or owners for the time being of the said Boscombe Manor Estate or any part thereof that the society, their successors or assigns will not erect or suffer to be erected on the hereditaments hereby conveyed any buildings other than private dwelling-houses with stables and buildings appurtenant thereto of not less value in first cost"—and then the cost is given—"and will not use any such building or permit any such building to be used except for the purposes aforesaid, or for the purpose of carrying on the profession of a surgeon or physician or the business of a lodging-house keeper; And will not erect or permit to remain on the hereditaments hereby conveyed any hut, caravan, shed, house-on-wheels, booth, show, swing or roundabout; and that for the period of ten years from the date hereof the society, their successors and assigns, before commencing to build on any part of the said hereditaments shall submit the plans of the proposed building to the vendor or his solicitor for the time being for his approval and such approval shall not be unreasonably withheld, the object of this covenant being to provide suitable and well planned houses for the health and comfort of the occupants and to ensure in some degree the uniformity of elevation." Those last words seem to me very important. There is also a covenant

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by the vendor, Sir Percy Shelley, as regards the land coloured green. I need not read the whole covenant, but practically it provides for the use of the land being subject to the same restrictions as in the case of the land coloured pink.

The devolution of the interests of the covenantor and the covenantee respectively, so far as material for the purposes of the present claim, may be briefly stated as follows. The Boscombe Building Society conveyed plots 11 and 12 of the land coloured pink to one Augustus Gould by two indentures each dated January 24, 1889, and Mr. Gould conveyed both these plots to the defendant by an indenture dated July 8, 1912. On the other hand, Sir Percy Shelley died in December, 1889, and under his will the fee simple in the unsold portions of the Boscombe Manor Estate vested in his widow, Lady Shelley. She died in June, 1899, and under her will the unsold portions of the same estate passed to Lord Abinger. Ultimately, by an indenture dated June 26, 1911, Lord Abinger conveyed the unsold portions of the estate to the present plaintiff. It is thus clear that prima facie the present plaintiff is entitled to the benefit, and the present defendant is subject in equity to the burden of the restrictive covenants contained in the indenture of November 13, 1888, so far as regards plots 11 and 12 of the second Shelley Estate.

This being so, the defendant, being desirous of erecting a shop on plot 11, applied in the course of last year to the plaintiff to allow this to be done. The plaintiff refused permission except on the terms of the payment to him of the sum of 100*l*. The defendant refused to pay this sum, and proceeded to erect a shop on plot 11, and the plaintiff has accordingly brought this action, and claims thereby an injunction in the terms of the appropriate part of the covenant above stated. The defendant, in answer to this claim, alleges that there has been such a change in the general character of the neighbourhood that the object for which the covenant was entered into has completely disappeared, and, further, that this change has to a great extent been brought about by the acts and omissions of the plaintiff and his predecessors in title; and accordingly he claims that it would be contrary to well-established principles of equity to grant specific performance of the covenant by way of injunction. I may here remark that,

although the statement of claim contains an alternative claim for damages, no such claim is, of course, sustainable at law, and none could be granted in equity unless there is a right to an injunction. And, in fact, no argument has been addressed to me in support of the claim for damages, nor has it been suggested that any damage will arise to the plaintiff from what the defendant is doing.

To deal with the defendant's plea it is necessary to ascertain what were the circumstances existing at the date of the conveyance of 1888, what are the circumstances existing now, and how far any change has been due to the acts or omissions of the plaintiff and his predecessors. The facts have been put before me very elaborately, but I will endeavour to give as short a summary as possible of the more important of them.

Christchurch Road is the main road leading from Bournemouth on the west, through Boscombe, towards Poole on the east. It was until comparatively recently a quiet country road with a few houses on either side, but there has, within the last thirty years, been an enormous increase in the population of Boscombe, and a corresponding change in the character of the Christchurch Road, which is its main artery. In the year 1888 there were no shops in Christchurch Road east of Palmerston Road on the north, and Sea Road on the south. Between Sea Road and the westernmost part of the second Shelley Estate the south frontage of Christchurch Road was occupied as follows from west to east, namely, first came a private house then called Winterslow, and afterwards called Theydon Lodge; then came a detached and two semi-detached private houses called Weybourne, Farnworth, and Smedmore, all under long leases to Messrs. Hoare & Waldon; and then came a frontage of some 208 feet which formed part of the first Shelley Estate which had been sold to the Boscombe Building Society without any restrictions as to the erection of shops, but on which private residences had, in fact, been erected, probably under restrictions to that effect imposed by the society. Accordingly, for some distance to the west of the second Shelley Estate, and throughout the whole frontage of that estate and of the land coloured green to the east of it, there was nothing to interfere with the purely residential character of the district

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From 1888 onwards, however, the residential character of the district has been seriously altered. As regards the north side of this part of Christchurch Road, the alterations began in about the year 1890 by the erection of an hotel called, I think, the Salisbury Hotel on the east side of Palmerston Road. An arcade, a theatre, and lock-up shops, with an assembly-room and library over, quickly followed. In about 1893 some twelve shops were built at the west corner of Ashley Road, and then the intervening space was soon filled up with shops into which private houses were turned. For many years past there has, with the exception of one small pair of semi-detached villas, been one continuous line of shops extending opposite the full length of the second Shelley Estate and for some considerable distance to the east. Further, electric trams now run at very frequent intervals along the street, and there appears to be no doubt that this part of the Christchurch Road has become an extremely busy shopping and commercial thoroughfare, and is, indeed, the main shopping district of the populous neighbourhood of Boscombe.

What took place on the south side of the Christchurch Road must be rather more carefully considered. In the year 1893 Lady Shelley sold the reversion in fee of Weybourne, Farnworth, and Smedmore to the then lessees, without keeping them under any restrictive covenants, and further assured to them the benefit of the restrictive covenants entered into by the grantee of Theydon Lodge in such a form as to render it easy for them to arrange with the owner of that property to release these covenants. The immediate consequence was that in a short time a bank was erected at the corner of Christchurch Road and Sea Road with a terrace of shops down Sea Road, and that a row of shops was also built on the frontages of Weybourne, Farnworth, and Smedmore to Christchurch Road; and about the same time, or soon after, the private houses along the frontage of 208 feet or thereabouts of the first Shelley Estate to Christchurch Road were converted into shops. Accordingly from the corner of Sea Road to the western corner of the second Shelley Estate a complete line of shops was substituted for the private residential frontage that previously existed.

Still more important for the present purposes is what occurred on the Christchurch Road frontage of the second Shelley Estate itself. These occurrences are as follows. On plot No. 1 a private house had been built in 1893. In or about the year 1910 a Mr. Rayner, who appears to have a great deal to do with land and houses in the vicinity and who had become the owner of this plot, converted this house into one large shop and two lock-up shops. On plot No. 3 a private house named Rivoli had been built, and remains there still, although unoccupied. A strip on the west side of the curtilage of this house was, in the year 1911, occupied as a site for a lock-up shop. Rivoli had for some time past had notices openly displayed on it, to the effect that it would be converted into shop property to suit applicants. Plot No. 5 remained vacant till the year 1909. In that year part of it was conveyed by Rayner to the Bournemouth Corporation for the purposes of a public library, and a library has been erected on that part accordingly. On plot No. 7 an expensive house called Boscombe Grange was erected, and is still there. It has long been unoccupied. Notices similar to those in the case of Rivoli have been displayed there for years. On plot No. 9 a large post-office was erected in about the year 1911. Plot No. 11 is the defendant's plot. It was vacant until he built. On plot No. 13 a private house named Wootton Lodge was erected. It is now used as a Gordon Boys' Home, and notices are displayed as to the work done by the boys. This occupation is in my view a breach, though, perhaps, but a trifling breach, of the covenant. Plots 15 and 17 are still private residences, and are occupied by doctors.

No breach appears to have occurred on the land coloured green on the plan in the indenture of November 13, 1888, of the covenants by the vendor with reference to that land. The easternmost house on that land is occupied as a nurses' home, that is, as a residence for trained nurses, but it has not been seriously argued before me that this is a breach. Further to the east again, both on the frontage to the Christchurch Road of that part of the Boscombe Manor Estate purchased by him, and also on some other property also purchased by him, the plaintiff is erecting, and proposing to erect, terraces of shops.

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On these facts Mr. Younger's first and principal objection to the defendant's plea, as above stated, is that on the conveyance of November 13, 1888, there was not, as between the plaintiff's predecessor in title, Sir Percy Shelley, and the defendant's predecessor in title, the Boscombe Building Society, any building scheme at all; that any building scheme was merely a matter of subsequent arrangement between the Boscombe Building Society and sub-purchasers from them; that the matter must be treated just on the same footing as if the Boscombe Building Society had sold the whole of the second Shelley Estate to a single purchaser who, after committing various breaches unrestrained on other plots, would not by these particular breaches purchase immunity for a fresh breach on plot No. 11; and that the case falls within the negative part of the decision in *Sayers* v. *Collyer* (1), and also within *Craig* v. *Greer* (2) and *Osborne* v. *Bradley*. (3)

I am unable to accede to this view. In my opinion, the question of a building scheme is one of intention, and an intention to create a building scheme is most clearly evinced by the particular document in question. The sale, though a sale in bulk, is to a society whose business it was to sell retail; the property is in fact cut up on the plan into plots which were conveniently sized for resale, and were, in fact, resold accordingly; and there are words at the end of the particular covenant in question which seem to me clearly to point to the mutual convenience of the intended sub-purchasers as the object of the arrangements that were being made. It was probably convenient to the building society that the arrangements they intended to make as between sub-purchasers should be indicated on the main document of title, and I think that the decision in *Peek* v. *Matthews* (4) and the observations of Lord Macnaghten in *Spicer* v. *Martin* (5) are in favour of the view I have indicated.

This being so, the relevant cases in my judgment are not those relied on by Mr. Younger, but such cases as *Duke of Bedford* v. *Trustees of the British Museum* (6), *Roper* v. *Williams* (7),

(1) 28 Ch. D. 103.
(2) [1899] 1 I. R. 258.
(3) [1903] 2 Ch. 446.
(4) L. R. 3 Eq. 515.
(5) 14 App. Cas. 12, 24, 25.
(6) 2 My. & K. 552.
(7) T. & R. 18.

Peek v. *Matthews* (1), *German* v. *Chapman* (2), and *Knight* v. *Simmonds*. (3) On the principles enunciated in those cases the acts and omissions of the plaintiff and his predecessors in title, and particularly the non-enforcement of the covenant as to plot No. 1, plot No. 3, plot No. 5, and plot No. 9, are amply sufficient to prevent the Court granting the equitable relief by way of specific performance of the covenant, or, in other words, by way of injunction, which the plaintiff is claiming. But if this alone were not enough I think the Court is, under the express and precise language to that effect both of James L.J in *German* v. *Chapman* (4) and of Lindley L.J. in *Knight* v. *Simmonds* (5), entitled also to take into account the general change in the character of the neighbourhood irrespective of the particular acts and omissions of the plaintiff and his predecessors in title. And if once this is done it is difficult to imagine a stronger case than this for declining to grant specific performance of the covenant by way of injunction.

Equitable relief has been extended beyond legal relief in these cases in two respects, namely, first, by enforcing covenants against assigns with notice of the original covenants, and, secondly, by giving instead of mere damages the fuller relief of specific performance by way of injunction. The effect would, but for the principles applied in the cases I have referred to, have been to stereotype and perpetuate, far beyond the real intention of the contracting parties, and to the prejudice of successive generations, restrictions which had in the course of time become obsolete and meaningless. And, having regard to the great number of persons who in the case of building schemes may be originally entitled to enforce these covenants, it would, I think, be an undue limitation of the discretion of the Court to refuse specific performance of the covenant if the refusal should be restricted to cases where there was some personal or individual default on the part of the plaintiff or his predecessors in title. This might easily result in the enforcement of such restrictions after long intervals of time and under totally changed conditions from motives of spite or caprice, or from

(1) L. R. 3 Eq. 515.
(2) 7 Ch. D. 271.
(3) [1896] 2 Ch. 294.
(4) 7 Ch. D. 279.
(5) [1896] 2 Ch. 297, 298.

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a desire to make money out of the relaxation of technical but obsolete restrictions. And it is for reasons of this kind that I understand James L.J. and Lindley L.J. to have carefully stated that the Court may refuse to specifically enforce such obligations in an altered state of circumstances: "Whatever the explanation of the altered state of things may be."

In the result I dismiss the action with costs.

Solicitors for plaintiff: *Peacock & Goddard, for Mooring Aldridge & Haydon, Bournemouth.*

Solicitors for defendant: *Waller & Mager, for D'Angibau & Malim, Boscombe, Bournemouth.*

F. E.

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DUNBAR *v.* HARVEY.

[1913 D. 693.]

Stannaries—Mining Partnership of Two—"Company"—Winding-up—Jurisdiction—High Court—County Court—Joint Stock Companies Act, 1849 (12 & 13 *Vict. c.* 108), *s.* 1—*Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 4, 81—*Stannaries Act*, 1869 (32 & 33 *Vict. c.* 19), *ss.* 2, 3—*Stannaries Act*, 1887 (50 & 51 *Vict. c.* 43), *ss.* 2, 3, 28—*Stannaries Court (Abolition) Act*, 1896 (59 & 60 *Vict. c.* 45), *s.* 1—*Partnership Act*, 1890 (53 & 54 *Vict. c.* 39), *s.* 1, *sub-s.* 2 (*c*)—*Companies (Winding-up) Act*, 1890 (53 & 54 *Vict. c.* 63), *s.* 1—*Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *s.* 131, *sub-s.* 4; *ss.* 267, 285.

A partnership of two persons formed to work metalliferous mines in Cornwall is a "company" within the meaning of that term in ss. 2 and 28 of the Stannaries Act, 1887, and is by s. 1, sub-s. 2 (*c*) of the Partnership Act, 1890, excluded from the provisions of that Act; and by virtue of s. 1 of the Stannaries Court (Abolition) Act, 1896, and s. 131, sub-s. 4, of the Companies (Consolidation) Act, 1908, the county courts of Cornwall now have exclusive jurisdiction to wind up such a company.

So *held* by the Court of Appeal, affirming the decision of Neville J.

MOTION.

By deed dated December 3, 1912, the plaintiff and the defendant entered into partnership for a term of two years to carry on the business of tin and other metalliferous miners, smelters, and refiners, under the style of "The Stannaries Mining and Smelting Company," in respect of certain lands in Cornwall which were the subject-matter of two licences

dated January 9, 1912. The working capital of the partnership was to be a sum of about 5400*l.*, which the plaintiff was to provide in certain instalments. The bankers of the partnership were in London.

Early in 1913 differences arose between the partners, and in May, 1913, the plaintiff issued a writ in the High Court against the defendant claiming a dissolution of the partnership and the usual consequential relief, and obtained, ex parte, the appointment of a receiver, and now moved that the receiver might be continued until the trial of the action. The defendant served on the plaintiff a cross-motion for an order that all further proceedings in the action might be stayed and that the action might be dismissed with costs on the ground that the High Court had no jurisdiction to wind up the partnership subsisting between the plaintiff and defendant for the working of mines situate within the Stannaries.

By arrangement the two motions came on together, and the defendant's motion was taken first. They came on for hearing before Neville J. on May 23, 1913.

C. Hartree, for the defendant. My motion goes to the jurisdiction of this Court. This partnership is formed to work mines within the Stannaries, and, as such, is a "company" within the meaning of the Stannaries Acts and is expressly excluded from the operation of the Partnership Act, 1890. By s. 81 of the Companies Act, 1862, the jurisdiction to wind up companies formed under that Act and engaged in working mines within the Stannaries was vested in the Vice-Warden of the Stannaries; and the Stannaries Act, 1869, contains special provisions for regulating and winding up mining partnerships in the Stannaries Court, and by s. 2 of the Act the term "company" includes any persons or partnership body working a mine in the Stannaries. Then by s. 28 of the Stannaries Act, 1887, the Stannaries Court was given the same jurisdiction to wind up companies formed to work mines in the Stannaries as it had theretofore exercised under s. 81 of the Companies Act, 1862, with respect to companies engaged in working mines in the Stannaries, and by ss. 2 and 3 of the Act of 1887 the term

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"company" includes any persons or partnership body "engaged in or formed for working" metalliferous mines within the Stannaries. That definition includes this partnership. Sect. 81 of the Companies Act of 1862 is repealed by the Companies (Winding-up) Act, 1890, which by s. 1, sub-s. 4, vests in the Vice-Warden of the Stannaries the jurisdiction to wind up companies formed under the Companies Acts for working mines in the Stannaries. Then comes the Stannaries Court (Abolition) Act, 1896, which repeals s. 28 of the Stannaries Act, 1887, but by s. 1 transfers all the jurisdiction and powers then existing in the Court of the Vice-Warden to the county courts of Cornwall, which would include the jurisdiction it then had under s. 28. The Companies (Winding-up) Act, 1890, is repealed by the Companies (Consolidation) Act, 1908, but s. 1, sub-s. 4, of the Act of 1890 is re-enacted by s. 131, sub-s. 4, of the Act of 1908; and having regard to the latter section and to ss. 249 and 267, which only deal with unlimited and unregistered companies of more than seven persons, it is submitted that there is no jurisdiction under the Act of 1908, nor under the Partnership Act, 1890, to wind up this company or partnership, and that the proper forum to wind it up is the Court exercising the jurisdiction of the Stannaries Court, and that is the county court of Cornwall.

Owen Thompson, for the plaintiff. I admit that the county court of Cornwall has exclusive jurisdiction to wind up companies registered under the Companies Acts and formed to work or engaged in working mines in Cornwall, but I do not admit that it has exclusive jurisdiction to wind up a partnership of two persons working mines in Cornwall. Sect. 28 of the Act of 1887 was passed to amend a defect in the law decided by the case of *In re Silver Valley Mines* (1), where it was held that at that time there was no jurisdiction in the Stannaries Court to wind up a company merely formed to work mines under the Companies Act, 1862. The section was passed to remedy that defect, but did not extend the exclusive jurisdiction of the Stannaries Court as alleged. Express words would be required for that purpose. But if the section is so to be read it will impliedly

(1) (1881) 18 Ch. D. 472.

oust the jurisdiction of the High Court in a great many cases. As to the Partnership Act, 1890, this association of two persons is not a "company" within the meaning of sub-s. 2 (*c*) of s. 1 of that Act. There is no definition of a company in the Act. This is a partnership within the Act, and not a cost-book mining company. The whole administration and jurisdiction of the Stannaries Court with regard to miners in Cornwall is summarized in the Stannaries Act, 1836 (6 & 7 Will. 4, c. 106). The authorities are in favour of the concurrent jurisdiction of the High Court and the Stannaries Court to wind up mining companies until we get to the Act of 1887 — *Trelawny* v. *Williams* (1); *Chester* v. *Spargo* (2); MacSwinney on Mines, 3rd ed. p. 480—and it is submitted that s. 28 of that Act merely extended the jurisdiction of the Stannaries Court to companies "formed to work" mines and did not oust the jurisdiction of the High Court. If that is so, this is an ordinary partnership and the plaintiff has a right to come to this Court to wind it up.

C. Hartree in reply. I admit the High Court had concurrent jurisdiction up to 1869. But ss. 2 and 28 of the Act of 1887 must be read together with regard to the meaning of "company" as used in the Act. If so, it is clear that the county court of Cornwall now has exclusive jurisdiction to wind up this company.

NEVILLE J. This case raises the point whether, having regard to the legislation since 1869, there is concurrent jurisdiction in the High Court and the Stannaries Court or exclusive jurisdiction in the Stannaries Court to wind up a partnership which is a "company" within the definition of that expression in the Stannaries Act, 1887, but which is not a company within the definition of a company in the Companies Act, 1862, and the subsequent Companies Acts. With regard to companies engaged in working or that have worked mines in Cornwall the Stannaries Court has exclusive jurisdiction, but the question is whether the Stannaries Court, having exclusive jurisdiction as to those companies, has exclusive jurisdiction over companies, in the sense

(1) (1704) 2 Vern. 483. (2) [1868] W. N. 90; 18 L. T. 314.

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of partnerships, formed to work metalliferous mines in Cornwall. Now in 1890 the Partnership Act was passed, and I think the better view is that s. 1, sub-s. 2 (*c*), of that Act, which excludes from the operation of the Act companies engaged in working mines in Cornwall, is intended to be a reference to what is defined as "a company" in the Stannaries Acts, 1869 and 1887. The consequence is that if the jurisdiction of the High Court and the Stannaries Court is still concurrent with regard to companies formed to work mines in Cornwall, the High Court in winding up such a company would have to apply, not the principles of the Partnership Act, 1890, but would have to resort to the principles existing in the Stannaries prior to that Act. That seems to me an improbable position. The immediate question here turns on s. 28 of the Stannaries Act, 1887, which may be read in one of two ways. [His Lordship read the section, and continued:] Now it may mean merely to enlarge the jurisdiction of the Stannaries Court so as to bring within its scope companies formed to work mines in Cornwall as well as companies actually engaged in working mines. But on the other hand s. 2 of that Act defines the term "company" to mean "any persons or partnership body, joint stock company, company constituted under the Companies Act, 1862, or any statutory modification thereof, and whether corporate or unincorporate, and whether limited or unlimited, engaged in or formed for working mines within the Stannaries." That definition covers the partnership in the present case, and the question is whether the Stannaries Court has the same exclusive jurisdiction over such a company as it previously exercised over companies registered under the Companies Act, 1862, and engaged in working mines in Cornwall. In my opinion that is the true meaning of the section, and the exclusive jurisdiction of that Court is not limited to companies registered under the Act of 1862 and engaged in working mines in Cornwall, but extends to companies as defined in the Act of 1887. The result is that the present partnership comes within the definition of a "company" in the Act of 1887 and that this action ought to have been brought in the Stannaries Court, now the county court of Cornwall, which has exclusive jurisdiction to wind up this partnership. No objection has been taken to the form in which the

present application has been brought before me. Therefore I refuse the plaintiff's motion for a receiver with costs, and make an order on the defendant's cross-motion staying further proceedings in the action which I dismiss with costs. The receiver must be discharged and bring in his account. The order had better be prefaced with the words "The Court being of opinion that the Stannaries Court has exclusive jurisdiction."

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H. L. F.

Against this decision the plaintiff appealed. The appeal came on for hearing on June 26, 1913.

C. A.

Peterson, K.C., and *Owen Thompson*, for the appellant.

C. Hartree, for the respondent.

The arguments used in the Court below were repeated, and the following additional authorities and text-books were referred to:—On behalf of the appellant, *Smith* v. *Anderson* (1); *In re New Terras Tin Mining Co.* (2); *Newton* v. *Nancarrow* (3); *Vice* v. *Thomas* (4); Batten on the Stannaries Act, p. 14; Pearce on the Laws and Customs of the Stannaries; and on behalf of the respondent, *Fenn's Case* (5); *Cox's Case* (6); and MacSwinney on Mines, 3rd ed. pp. 474 et seq.

COZENS-HARDY M.R. This is an appeal from a decision of Neville J. which raises a difficult and interesting question as to the true meaning and effect of s. 28 of the Stannaries Act, 1887.

The Stannaries jurisdiction is very peculiar and ancient. It is not necessary, I think, for the purposes of to-day to do more than refer to the Stannaries Act, 1836, which says in plain terms that there was in the Stannaries Court a common law jurisdiction in certain cases where tin or tinners or matters connected with tin were concerned. It also says that there was an original equitable jurisdiction. It then goes on to say that the jurisdiction, in common law certainly, and possibly as to equity also, was limited to tin and tinners, but that

(1) (1880) 15 Ch. D. 247, 273.
(2) [1894] 2 Ch. 344.
(3) (1850) 15 Q. B. 144.
(4) (1837) Smirke.
(5) (1854) 4 D. M. & G. 285, 293.
(6) (1863) 4 D. J. & S. 53.

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there were other metals and mines in Cornwall, and that there were various persons working and interested in such lead, copper, and other metals who were greatly inconvenienced in their disputes in cases where such metals and metallic minerals other than tin were concerned. Then it goes on: "And whereas it is expedient to unite the Court of Equity of the Vice-Warden with the Courts of Common Law of the Steward of the said Stannaries, and to extend the jurisdiction of the Court to and over all metals and metallic minerals in the said Stannaries, and to and over all transactions connected therewith in the said county of Cornwall, in manner hereinafter mentioned"; and to confirm the jurisdiction generally. Then s. 4 provides "that the original equitable jurisdiction heretofore lawfully exercised by the Vice-Warden for the time being shall and may be henceforth exercised by the present and future Vice-Warden for the time being, and that the present and every future Vice-Warden for the time being shall have, exercise, and enjoy the same equitable jurisdiction, and the same power and authority in all matters and things brought before him, so far as relates to the working, managing, conducting, or carrying on any mine worked for any lead, copper, or other metal or metallic mineral within the said county of Cornwall, or to the searching for, working, smelting, or purifying any lead, copper, or other metal or metallic mineral within the said county, in as full and ample a manner as if the same had related to any tin, or tin ore, or tin mine, or mine worked for tin, in the said county." Then there is a proviso which is not free from importance, I think: "Provided always, that nothing herein contained shall be deemed or taken to affect any suit or matter now pending in any Court of Law or Equity"; that is to say, having given in clear terms to the Stannaries Court certain jurisdiction which it had not before as extended to metals other than tin, it does not say this is a jurisdiction which may be exercised but which is not exclusive; it is not a saving of the jurisdiction of the Courts of Common Law and Equity sitting in London, but it is a saving only of any suit or matter now pending in any Court of Law or Equity. That seems to me, as Kennedy L.J. pointed out in the course of the argument, to render at least plausible—I will not

say more—the view that the jurisdiction given to the Vice-Warden by this Act was an exclusive jurisdiction, except, of course, only, and with the saving only, for then pending matters. The policy of the Legislature has been, I will not say absolutely uniform, but it certainly has been very nearly uniform. It is quite clear that the Legislature in the Companies Act, 1849 (12 & 13 Vict. c. 108), s. 1, qualified the right of anybody to present a petition for the winding up in the Court of Stannaries of cost-book companies. It said it shall not be done unless the petitioners hold a certain proportion of shares; I think it was one-tenth. Then in the Companies Act of 1862 there was an express provision that the Court for winding up a Stannaries company was not the High Court, but the Stannaries Court, and it has not been disputed that the jurisdiction of the Stannaries Court in a case falling within that exception was exclusive, but it was held in *In re Silver Valley Mines* (1) that the language of the Companies Act, 1862, only applied to a company actually engaged in working minerals. Although Sir John Romilly had held that that applied to a company formed for the purpose of working but not actually having worked, the Court of Appeal, presided over by Sir George Jessel, held that that was not so, and that the Chancery Division of the High Court could wind up a company which had not actually engaged in working a mine but was merely formed for the purpose of working. That was felt to be an inconvenience, and it was dealt with by two Acts of Parliament. The first was the Act of 1887, upon which the present question turns; and the next was the Companies Act, 1890, which expressly said in s. 1, sub-s. 4, that a company the jurisdiction to wind up which is limited to the Stannaries Court includes a company formed for working. The Stannaries Act of 1887 is almost a code in this matter. It is a curious code, but I think the odd language used is partly due to this circumstance, that, speaking very generally, and not by any means intending to lay down a positive proposition, a cost-book company, which is at least a common term, if not a recognized legal term, was merely a partnership, the members of which had special rights and privileges. It therefore was not an unnatural

(1) 18 Ch. D. 472.

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thing, in dealing with an Act amending the Stannaries Act of 1869, and for other purposes, for the Legislature to include, as they undoubtedly did to a large extent in this Act, companies strictly so called, that is to say, limited companies or chartered companies or unlimited companies, and it was not an unnatural thing to include in those provisions partnerships engaged in or formed for the purpose of working. When I come to the Act itself, s. 2 is the definition clause, and it is a definition clause in what I may call a very strong form. It says: "The term 'company' means"—not merely includes unless the context otherwise requires, but "means"—"any persons or partnership body, joint stock company, company constituted under the Companies Act, 1862, or any statutory modification thereof, and whether corporate or unincorporate, and whether limited or unlimited, engaged in or formed for working mines within the stannaries." It is impossible to doubt that that definition taken alone plainly includes an association of persons, two in number in the present case, formed for the purpose of working mines within the Stannaries. Then if you go through the Act, it is equally clear that there are certain sections, I think the majority of them, which beyond all question do apply both to what may be called private partnerships and to incorporated companies. It is equally clear that there are some sections which do not do that. In some sections there is an express reference to, for instance, what the purser of every cost-book mine shall do. That is merely one that catches my eye. There are a number of sections which are expressly limited to cost-book mines and do not extend to ordinary partnerships. Then we come to s. 28, around which the battle has raged. I will read it first without comment: "The Court of the Vice-Warden of the Stannaries shall have the same jurisdiction in the winding up of all companies formed for working mines within the Stannaries"—then there is an exception which I need not read, which is if the company is engaged in working mines also out of the Stannaries' jurisdiction—"as has heretofore been exercised by the said Court pursuant to the 81st section of the Companies Act, 1862" I pause there for one moment. What was that? That was an exclusive jurisdiction conferred upon the Stannaries Court to

wind up companies in the Stannaries. It goes on to say "in respect of companies engaged in working any mine within and subject to the jurisdiction of the said Stannaries." Here we are asked to say that this section is really to be read as though it contained at the end the words "The definition clause as to the meaning of 'companies' does not apply to this section; it does not apply because in the Companies Act, 1862, s. 81, the word 'companies' refers to incorporated companies." That seems to me to be a view to which we ought not to lend countenance. It seems to me that we are really asked to say "True, jurisdiction is given, but it is the same jurisdiction, although in the one case it was exclusive and in the other one not." That is a view which I cannot myself follow. Neville J. has, I think, stated reasons which I am quite content to adopt. He has said that s. 28 gives the Stannaries Court the same jurisdiction as it previously had over a company within the meaning of the Companies Act, 1862. That was an exclusive jurisdiction. That which was given was not merely jurisdiction of the same nature, that is, optional, but it was an exclusive jurisdiction both in the one case and the other, and I think, that being so, the view taken by Neville J. was right, and the action commenced in the High Court for dissolution of the partnership and for partnership accounts fails, and the parties must go to the county court of Cornwall. For those reasons I think the appeal must be dismissed.

KENNEDY L.J. I am of the same opinion. It is, in my view, a case not free from difficulty, and therefore on that account I desire to add to what the Master of the Rolls has said my acknowledgment of the great assistance which we have received from the arguments of counsel.

The question is whether or not the particular partnership between two persons, Mr. Henry Harvey and Mr. James John MacWhirter Dunbar, of December 3, 1912, comes within the word "companies" in s. 28 of the Stannaries Act, 1887. With regard to the partnership deed itself, the only material thing to be said is that in addition to certain special clauses there is a provision in the 12th article, referring to the law and

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customs of the Stannaries, enacting that all cheques drawn on the banking account of the partnership shall be signed by both partners and the purser in accordance with the law and customs of the Stannaries, and further, in article 14, that one of the partners, who appears to be the person intended by the partnership deed to be the acting partner, binds himself to conform in the conduct of the business to all the requirements of the Stannaries Acts, 1869 or 1887, and any other statute for the time being in force that may be applicable thereto, and will duly observe all such local customs as may be legally binding upon the partnership.

The short question really is whether that partnership is to be included or not in the word "companies" in the second line of the 28th section of the Act of 1887. I have referred to the terms of the partnership deed to shew, if it were necessary, that there is nothing unreasonable in the Legislature treating such a partnership as one which, like a company in the strict sense of the term to which the Companies Act of 1862 applied, might properly, in regard to proceedings in winding-up, be brought within the jurisdiction of the Court of the Vice-Warden of the Stannaries. Now we have, as it seems to me, simply to look at the actual words of the statute. It is very important to bear in mind certain propositions of general application. One is that one ought not to deviate from the natural and plain meaning of the words. If the words are plain and there is nothing in the general scheme of the Act against giving them their plain and natural meaning, one ought not to give to the plain words of the statute any unnatural or more remote meaning. The other is this. I agree that the object, which, according to the view of Neville J., is said to have been attained by the legislation, is an exclusion of the jurisdiction of the High Court of Justice generally, and I think we ought not to give an exclusive jurisdiction to another tribunal without clear words telling us so to do. To both of those principles I adhere.

Here we have, as has been pointed out, in the definition clause in the 2nd section of the Act, a provision which allows of no mistake, that the term "company" means any persons or partnership body—in other words, in the very first portion of the Act you are

told that in reading the statute you are to read the word "company" wherever it occurs as meaning "persons or partnership or other company," as stated in the terms of the definition clause. Then on reading s. 28 we find this, that in the winding up of all companies formed for working mines within the Stannaries the Court of the Vice-Warden of the Stannaries shall henceforth have the same jurisdiction as has heretofore been exercised by the said Court pursuant to s. 81 of the Companies Act, 1862, in respect of a particular body of companies, namely, those engaged in working mines within and subject to the jurisdiction of the Stannaries. But we are told by the definition clause that the term "company" not only includes but means "any persons or partnership body," so that wherever we find the word "company" in connection with this 28th section we must so read it. I do not see, if we adhere to the principles of construction which we are bound to follow, how we are at liberty to come to any other conclusion than that which has been already expressed by the Master of the Rolls.

SWINFEN EADY L.J. I am of the same opinion, and if we look at the history of the matter, and the way in which the winding up of companies has been successively dealt with, I think the question is reasonably free from doubt. Under the winding-up section of the Companies Act, 1862, there was exclusive jurisdiction in the Stannaries Court to wind up a company engaged in working mines in the Stannaries. Then the question arose with regard to a company which, although formed to work a mine within the Stannaries, was not engaged in working. It was held that that did not come within the Act and that the High Court had jurisdiction. That was subsequently altered by the Act of 1890, s. 1, sub-s. 4, of which provided that where a company is "formed for working" mines within the Stannaries, it shall be wound up in the Stannaries Court. Then a case came before Vaughan Williams J., *In re New Terras Tin Mining Co.* (1), where it was held that the Stannaries Court had exclusive jurisdiction to wind up a company formed to work mines within the limits of the Stannaries, although not exclusively

(1) [1894] 2 Ch. 344.

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within those limits. Under the present Winding-up Act it is also equally clear that the same language is used in s. 131, sub-s. 4: "Where a company is formed for working mines within the Stannaries and is not shown to be actually working mines beyond the limits of the Stannaries, or to be engaged in any other undertaking . . . . a petition to wind up the company shall be presented to the Court exercising the Stannaries jurisdiction whatever may be the amount of the capital of the company and wherever the registered office of the company is situate." So that the ordinary winding-up jurisdiction for a company engaged in working or formed to work mines within the Stannaries is the Stannaries Court, and that is an exclusive jurisdiction.

The present concern is a partnership, and in my opinion this partnership between the plaintiff and defendant is a company within the meaning of the definition of the word "company" in the Stannaries Act of 1887. There the term "company" is defined, and it means "any persons or partnership body,"—and in my opinion this is a partnership body—"joint stock company, company constituted under the Companies Act, 1862, or any statutory modification thereof, and whether corporate or unincorporate, and whether limited or unlimited, engaged in or formed for working mines within the Stannaries." It is not open to doubt that the partnership in question is at all events a partnership body formed for working mines within the Stannaries, and therefore it is a company within the definition section. Then turning to s. 28, "The Court of the Vice-Warden of the Stannaries shall have the same jurisdiction in the winding up of all companies formed for working mines within the Stannaries, as has heretofore been exercised by the Court, pursuant to the 81st section of the Companies Act, 1862, in respect of companies engaged in working any mine." That section gave to the Stannaries Court, which is now the county court, jurisdiction to wind up a partnership body formed for working mines within the Stannaries. But that does not cover the whole question, because the first step is only to say that the county court has jurisdiction, there being the further question, has it exclusive jurisdiction? The question of jurisdiction has arisen under s. 35 of the Companies Act, 1862, which gives power

to rectify the register where a person's name is without sufficient cause entered in the register of joint stock companies. The Act provides that a person may apply as respects companies registered in England by motion in any of Her Majesty's superior Courts of Law or Equity, or to the Vice-Warden of the Stannaries in the case of companies subject to his jurisdiction. Then this question arose, Is the Court of the Vice-Warden to exercise exclusive jurisdiction or a concurrent jurisdiction? This came before the Court of Appeal in *In re Penhale and Lomax Consolidated Silver Lead Mining Co.* (1), namely, whether the jurisdiction conferred on the Vice-Warden of the Stannaries by the 35th section of the Companies Act to rectify the register of companies within the district of the Stannaries does not exclude the jurisdiction of the superior Courts of Common Law and Equity for the same purpose. Stuart V.-C. held that the jurisdiction was limited to the Stannaries Court. The Court of Appeal in Chancery, consisting of Lord Cairns and Turner L.J., reversed that decision, but it is material to consider the grounds of their judgment because they drew a distinction between an application under s. 35 where there is concurrent jurisdiction and dealing with the matter of the winding-up under s. 81 where there is exclusive jurisdiction, and referred to certain reasons why there should be exclusive jurisdiction. The argument used on behalf of the appellant, who contended that the Vice-Chancellor was wrong, was this : " It is true that the 81st section appears to give exclusive jurisdiction, in winding up, to the Stannaries Court; but the reason for that provision is that local knowledge and local machinery would be necessary to wind up the affairs of a mining company : *In re East Botallack Consolidated Mining Co.* (2) In the case of rectifying the register no such peculiar knowledge is necessary." Then Lord Cairns in dealing with the matter says (3) : " If it were a question requiring local knowledge, or local evidence, I could understand the expediency of its being sent to Cornwall for the decision of the Vice-Warden, but it is difficult to see why such a question as the rectification of the register cannot be equally well decided in London. The 81st section "—that is the same section as is

(1) (1867) L. R. 2 Ch. 398. (2) (1864) 13 W. R. 197.
(3) L. R. 2 Ch. 403.

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referred to in s. 28 of the Stannaries Act of 1887, the Act we are construing—"stands on a wholly different footing. In the winding-up, questions may arise which may render it very proper that the case should be placed under the jurisdiction of the Stannaries Court, where there are means of peculiar knowledge." The rule is no doubt thoroughly well established that the jurisdiction of the superior Courts can only be taken away by positive and clear enactments in an Act of Parliament, and that has been interpreted in the judicial decisions more than once to mean either by express words or by necessary implication, so that in order to determine whether the Stannaries Court has exclusive jurisdiction one has to see whether that is not the necessary implication from the words used. We start with this, that under the 81st section, in the matter of winding up, the Stannaries Court has exclusive jurisdiction. Then s. 28 of the Act of 1887 says that the Court of the Vice-Warden of the Stannaries shall have the same jurisdiction in the winding up of companies under this Act. It is a necessary implication from s. 28 of the Act of 1887 that the Court of the Vice-Warden of the Stannaries, which is now the county court, having the same jurisdiction, should have exclusive jurisdiction. For these reasons I think the appeal fails.

Solicitors: *Nicholls, Herbert & Co.; A. J. Pidduck.*

G. A. S.

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In re TEOFANI & CO.'S TRADE MARK.

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June 11, 20, 24, 26; *July* 11.

Trade Mark—Application to register Surname—Distinctive Mark—Order of Board of Trade directing Registrar to proceed with Application—Registration—Application to remove Mark from Register—Effect of Order of Board of Trade—Passing off—Action to restrain—Use by Defendant of his own Name—Trade Marks Act, 1905 (5 *Edw.* 7, *c.* 15), *s.* 9, *par.* 5; *ss.* 35, 44.

A preliminary order of the Board of Trade or the Court under s. 9, par. 5, of the Trade Marks Act, 1905, directing the Registrar of Trade Marks to proceed with an application to register a surname as a trade mark merely enables the application to proceed as if it were an ordinary and not a special application, and is in no way final or conclusive so as to prevent the Registrar from subsequently refusing the application for registration on its merits, or to preclude the Court upon an application, after registration, by a person aggrieved under s. 35 from expunging the entry on the ground that the trade mark is not in fact distinctive.

Decision of Warrington J. [1913] 1 Ch. 191, reversed on this point.

A surname is not necessarily incapable of being a registrable trade mark. It may be registered, for instance, where it is an uncommon name and its user has been so extensive that it has in fact become distinctive, within s. 9 of the Trade Marks Act, 1905, for the goods with respect to which it is registered or proposed to be registered. Applications to register surnames ought, however, to be closely scrutinized, and registration only permitted where the distinctive character of the mark is clearly proved.

Teofani & Co., Limited, and their predecessors in business had for more than twenty years traded in London as tobacco and cigarette manufacturers, and during that period had used the name "Teofani" as a trade mark to an extent which, in the opinion of the Court, made it in fact "distinctive" for cigarettes. The name was uncommon, there being only one person (A. Teofani) in the United Kingdom who bore it besides the predecessors in business of the company. In 1909 the company obtained an order of the Board of Trade under s. 9, par. 5, of the Trade Marks Act, 1905, for the registration of the name "Teofani" as a trade mark.

On appeal from the refusal of Warrington J., on the application of A. Teofani, to order the removal of the mark from the register:—

Held, that the mark was properly registered.

The plaintiffs, Teofani & Co., Limited, and their predecessors in business had for many years manufactured and sold cigarettes as "Teofani's cigarettes," under which description they had become well

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known to the trade and the public. In 1909 the plaintiffs caused the name "Teofani" to be registered as their trade mark. In 1911 the defendant, Athanasius Teofani, commenced to make and sell cigarettes under the description of "A. Teofani's cigarettes."

In an action to restrain passing off and infringement of the plaintiffs' trade mark Warrington J. granted an injunction restraining the defendant from selling or offering for sale cigarettes as "A. Teofani's cigarettes" or otherwise marking his goods with the name "Teofani," either with or without other names, without clearly distinguishing such cigarettes from those of the plaintiffs, and from infringing the trade mark:—

Held, on appeal, that the injunction was rightly granted.

APPEAL from a decision of Warrington J. (1)

In 1887 Panajotti (2) Teofani and one Constantine Mercias established in London a business of tobacco and cigarette manufacturers which they carried on under the name of Teofani & Co. until 1908. In that year a company, called Teofani & Co., Limited, was incorporated to take over and carry on that business, and Panajotti Teofani became its governing director.

On April 5, 1909, the company made a special application under s. 9, par. 5 (1.), of the Trade Marks Act, 1905, to register the word "Teofani" as a trade mark in class 45 in respect of manufactured tobacco, and the Registrar duly sent the company's case to the Board of Trade. On October 19, 1909, the Board of Trade made an order whereby they determined "that the Registrar of Trade Marks do proceed with the registration of the said trade mark." The application then proceeded in due course under r. 41. Evidence of user in London was filed in support of the application; the application was advertised; there was no effective opposition in answer to the advertisement, and on December 20, 1909, the mark (No. 312,065) was duly registered.

On March 23, 1912, Teofani & Co., Limited, brought an action against Athanasius Teofani, a brother of Panajotti Teofani, who had recently commenced to trade in his own name as a tobacco and cigarette manufacturer and to sell cigarettes as "A. Teofani's cigarettes," to restrain him from infringing the company's trade mark and from passing off his goods as and for those of the plaintiffs. On May 10, 1912, Parker J. granted an

(1) [1913] 1 Ch. 191.

(2) *Sic*, apparently an Italianized form of the common Greek name Panagiotes.

interim injunction to restrain the defendant from passing off. The defendant then moved, under s. 35, for an order to rectify the register by removing the mark therefrom.

By his particulars of grounds of objection he alleged (inter alia) that he had, pursuant to s. 44 of the Act of 1905, an independent and concurrent right to the use of his own surname in common with Teofani & Co., Limited; that he had never transferred or otherwise parted with his right to use that surname, nor had he undertaken to refrain from so doing; that although the surname "Teofani" might be adapted to distinguish the goods of all persons taken collectively who bore that surname from the goods of other persons bearing a different name, it was not adapted to distinguish the goods manufactured by Teofani & Co., Limited, from those of other persons within the meaning of s. 9, par. 5, of the Act of 1905, and in particular from the goods of the applicant; that the name "Teofani" was not in its nature adapted to distinguish the goods of Teofani & Co., Limited, from those of other persons; and that even if it were in its nature adapted to distinguish as before mentioned, and the evidence established that it had become by user in fact distinctive, the registration thereof should not interfere with any bona fide use by the applicant of his own name and/or any bona fide description of the character and quality of the goods.

Athanasius Teofani filed no fresh evidence upon the motion, but gave notice that he would read the declarations filed by the company on their original application for registration.

The action came on for trial with the motion on November 28, 1912.

Warrington J. refused the motion on the following grounds, namely, that he was precluded from holding that the mark could not be registered—i.e., that it was outside the category of registrable marks—by the order of the Board of Trade, which for this purpose was, under the Act, a tribunal of co-ordinate jurisdiction with the Court; and that, on the question whether the Registrar was wrong in putting the mark upon the register, the applicant had adduced no evidence at all and had failed to shew affirmatively that the entry was made on the register without sufficient cause.

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Warrington J. then tried the action, and having come to the conclusion upon the evidence that the defendant had represented and intended to represent that the cigarettes sold by him were made by the well-known Teofanis, he granted an injunction restraining the defendant from selling or offering for sale cigarettes as "A. Teofani's cigarettes" or otherwise marking his goods with the name "Teofani," either with or without other names, without clearly distinguishing such cigarettes from the cigarettes of Teofani & Co., Limited, and from infringing their trade mark.

Athanasius Teofani appealed against both these decisions.

Comyns Carr, for the appellant. First as to the motion, it is a motion by an aggrieved person to rectify the register under s. 35 of the Act, and the onus is on him to shew that the mark is wrongly remaining on the register. It is not incumbent on him, as Warrington J. seemed to think, to shew that the entry was made without sufficient cause, for that would be inconsistent with what was said by Lindley M.R. in *In re Batt & Co.'s Trade Marks* (1), which was decided under the old statute where the words were not so wide as those in s. 35.

For the purposes of their original application the company require the order of the Board of Trade to put them on the same footing as an ordinary applicant. But in spite of the order of the Board of Trade I submit that the mark was not in fact adapted to distinguish and the Registrar could have refused to put it on the register, as was done in *In re Joseph Crosfield & Sons, Ld.* (2) The order of the Board of Trade did not preclude all persons for all time from objecting that this was not a distinctive mark as Warrington J. has held. In *In re Hjorth & Co.'s Application* (3) Swinfen Eady J. had this point in mind and said that it was not for the Court at that stage to say that the mark was distinctive. The application in the present case was made before this point had been brought to the notice of the Courts.

[*Austen-Cartmell.* There was no declaration in the Board of Trade's order in this case. The order was simply that the

(1) [1898] 2 Ch. 432, 441. (2) [1910] 1 Ch. 130.
(3) [1910] 2 Ch. 64.

Board of Trade "do by this order determine that the Registrar of Trade Marks do proceed with the registration of the said trade mark." (1)]

Parker J. in *In re Itala Fabbrica di Automobili's Application* (2) made only such order as would authorize the Registrar to proceed. Both Swinfen Eady J. and Parker J. were careful to guard against prejudicing any opponent who might come in after the advertisement or under s. 35. The question was also discussed in *In re W. & G. Du Cros' Applications* (3) and *In re R. J. Lea, Limited's Application*. (4) The Legislature can never have intended that the preliminary order of the Board of Trade or the Court, which is made ex parte, should preclude subsequent opposition to the mark on the ground that it was not distinctive.

Further, even if the order of the Board of Trade was binding on Warrington J. as a tribunal of co-ordinate jurisdiction, it is not binding on this Court.

Maugham (*Colefax, K.C.*, with him), for the respondent company. Without an order of the Board of Trade or the Court it is clear that a surname does not come within the category of registrable marks. There has been an order of the Board of Trade which has had the effect of bringing the word Teofani within the category of registrable marks, and if once that is established there cannot be any ground for taking the mark off the register on account of impossibility of registration. I do not suggest, nor did Warrington J. decide, anything more than that the order of the Board of Trade was conclusive that this mark came within the category of registrable marks—not that it was in fact a registrable mark. If the present appellant had come in answer to the advertisement he could have opposed the registration on other grounds, but he could not in face of the order of the Board of Trade have contended that the mark was not within the category of registrable marks.

[SWINFEN EADY L.J. You say that it was open to him to contend that it was not in fact distinctive, but that it was not open to him to contend that it could not be distinctive?]

Yes, that is the whole point. He argued impossibility of

(1) (1913) 30 Rep. Pat. Cas. 76, 77.
(2) (1910) 27 Rep. Pat. Cas. 493.
(3) [1912] 1 Ch. 644.
(4) [1913] 1 Ch. 446.

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registration in the Court below and nothing else, and Warrington J. held that the applicant was precluded by the order of the Board of Trade from arguing impossibility, and on the further question whether the mark was in fact distinctive the learned judge held on the merits that the applicant failed.

In the course of the argument in *In re R. J. Lea, Limited's Application* (1) the Solicitor-General seems to have adopted the view taken by Warrington J. in this case of the effect of an order of the Board of Trade. The function of the Court or the Board of Trade is to extend the category of registrable marks, and when once that is done it is conclusive as to the extension but not conclusive as to the fact whether the mark ought to be distinctive or not.

Austen-Cartmell, for the Registrar. The question is what is the effect of an order of the Court or the Board of Trade under par. 5 of s. 9.

I submit that nothing in that paragraph precludes or prejudices an application under s. 35, and that the only effect of such an order is to open the door to registration and to put a surname upon the same footing as an ordinary mark. That is in accordance with s. 40 and is not in any way a bar to an attack under s. 35. Warrington J. went too far in treating the order as a judgment in rem and in deciding that it was a bar in limine.

The proper view was taken by Neville J. in *Thorne* v. *Sandow* (2), when on a motion to remove a trade mark he said that he would deal with the case on its merits, without in the least feeling himself bound by the fact that the Board of Trade directed the registration to proceed.

The preliminary order is only an acceptance of the application, its effect being to put the surname on the ordinary footing. In *In re R. J. Lea, Limited's Application* (3) Hamilton L.J. seemed to think that an application under s. 35 was left at large.

COZENS-HARDY M.R. We need not trouble you to reply on this point, Mr. Comyns Carr.

This is an appeal from an order of Warrington J., who has

(1) [1913] 1 Ch. 446.
(2) (1912) 29 Rep. Pat. Cas. 440, 451.
(3) [1913] 1 Ch. 463.

taken the view that it was not competent for him to hear this application under these circumstances. Teofani & Co. were desirous of registering the name "Teofani" under the Trade Marks Act, but it is quite clear that they could not proceed at all unless they obtained what I venture to call a passport from the Board of Trade, or from the Court.

It is only necessary for me to read a portion of s. 9 of the Act: "A registrable trade mark must contain or consist of at least one of the following essential particulars," and then comes: "(1.) The name of a company, individual, or firm represented in a special or particular manner." That means in a particular form of writing, or design, or something of that kind. Then: "(2.) The signature of the applicant for registration or some predecessor in his business; (3.) An invented word or invented words; (4.) A word or words having no direct reference to the character or quality of the goods, and not being according to its ordinary signification a geographical name or a surname; (5.) Any other distinctive mark, but a name, signature, or word or words, other than such as fall within the descriptions in the above paragraphs (1.), (2.), (3.) and (4.), shall not, except by order of the Board of Trade or the Court, be deemed a distinctive mark."

The Board of Trade did make an order on the application. Mr. Austen-Cartmell has just read the form of the order, and it was in this form: "That the Registrar of Trade Marks do proceed with the registration." That being so, the matter went on in due course under r. 41. It was advertised. There was, I understand, no opposition, and the mark was put on the register, and is there now. Teofani & Co., the owners of this registered trade mark, have commenced an action against the present appellant Athanasius Teofani, and say that he is using their trade mark, and the application for an injunction was met, as is usual in such cases, by an application to rectify the register under s. 35. This is a section framed in very wide language: "The Court may, on the application in the prescribed manner of any person aggrieved by the non-insertion in or omission from the register of any entry, or by any entry made in the register without sufficient cause, or by any entry wrongly remaining on

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the register, or by any error or defect in any entry in the register, make such order for making, expunging, or varying such entry, as it may think fit." It is quite clear that the present appellant is a person aggrieved by reason of the entry in the register. An injunction was sought against him and has been granted in the Court below on the ground that he is infringing this trade mark. He was not aware of the application for registration, and he is now carrying on, or proposes to carry on, a similar trade. He desires to use his own name and he asks to have the register rectified.

The learned judge, Warrington J., seems to have considered that the order made by the Board of Trade under s. 9, par. 5, was, according to one phrase which he appears to have used, a judgment in rem and conclusive against all the world, and that therefore he had no jurisdiction to hear the application. In another part of his judgment he puts it on a somewhat different ground, namely, that a Court having co-ordinate jurisdiction with himself—and for this purpose the Board of Trade must be treated as a Court—having made that order it is not competent for him to revise it or to discharge it. With the utmost respect to Warrington J. I cannot assent to that view.

It seems to me that in the case of an application under s. 35 by a person aggrieved the burden is on the applicant under s. 35, of course, to shew that the entry in the register is wrong and that it ought to be rectified. The burden is not on the man who is on the register to maintain it. He has to defend an attack. But to hold that an order of that kind, obtained ex parte, without notice to the person aggrieved, is the one sort of order which is taken out of the operation of s. 35 seems to me to be entirely wrong. I am quite content with and I adopt as my own what Neville J. said in *Thorne* v. *Sandow* (1) in the matter of the trade mark "Health": "It appears to me that, notwithstanding that under s. 9 of the Trade Marks Act, 1905, the Board of Trade directed the registration of that mark to be proceeded with, the matter having come before me now to be determined on the motion to remove the mark, it is my duty to deal with the case on its merits, without in the least feeling

(1) 29 Rep. Pat. Cas. 440, 451.

myself bound by the fact that the Board of Trade directed the registration to proceed. I do not think the Act in any way intends, by the provision with regard to the Board of Trade, to interfere with the duties of the tribunal which has to determine, on the merits, whether in its opinion this trade mark ought to be allowed to remain on the register, assuming the applicants for removal come within the proper time." That statement of the law I desire respectfully to adopt. I think that it is entirely consistent with everything which fell from this Court in *In re Joseph Crosfield & Sons, Ld.* (1), the "Perfection Soap" case. It is plainly consistent with everything that fell from this Court in *In re R. J. Lea, Limited's Application* (2), and it seems to me to follow on the plain language of the sections of the Act. It is, moreover, in accordance with that which, if I may refer to my own experience, has been the settled practice of this Court for very many years under the old Act as well as under this Act. I refer to the "Valvoline" case, *In re Leonard & Ellis's Trade Mark* (3), a case which is a good illustration of the practice.

There is a further protection given under the present Act which limits the time after which a mark obtains an unimpeachable position under the Act, but, subject to that question, it seems to me it is perfectly open for any one who is aggrieved to come into Court and say "Remove this mark from the register, because I am satisfied that it ought not to be there," and in so doing he ought not to be in any way hampered or hindered by the fact that on an ex parte application the Board of Trade in perfect good faith removed a barrier in the way of a man who wanted to apply to the tribunal which has to deal with the registration of trade marks.

That being so, I think the learned judge was wrong in the view which he took, and that upon this preliminary objection we ought to decide in favour of the applicant. Not one word that I have uttered or intend to utter in any way precludes argument on the merits of the case. I have to deal with, and have intended solely now to deal with, the preliminary point that the learned judge was wrong in holding that the matter was not competent

(1) [1910] 1 Ch. 130. (2) [1913] 1 Ch. 446.
(3) (1884) 26 Ch. D. 288.

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for him and that there was a judgment in rem, or that there was some sort of estoppel, which barred the present applicant. In my opinion any such contention cannot prevail, having regard to the express language of s. 35.

KENNEDY L.J. I am entirely of the same opinion, and have nothing to add to the grounds of the judgment which has been pronounced by the Master of the Rolls. It appears to me that on reason and authority the appeal on this preliminary point ought to succeed.

SWINFEN EADY L.J. I am of the same opinion. The judge in the Court below appears distinctly to have come to the conclusion that the order made by the Board of Trade precluded him from entertaining the question before him. He stated that he could not reverse the decision of a Court of co-ordinate jurisdiction with himself, and so could not reverse an order of the Board of Trade, since the Board of Trade is as much a tribunal as the Court. That seems to me to proceed upon a misconception of what the order of the Board of Trade really was. The order was that the application do proceed. It enabled the application to proceed as if it were an ordinary and not a special application. The Registrar himself was not bound by the order, because notwithstanding the order that the application do proceed he might, on the hearing of the application, on the merits have refused the application; and in fact in *In re Joseph Crosfield & Sons, Ld.* (1) that was done. In that case an order was made by the Board of Trade for the application to proceed, and then when it came before the Registrar after advertisement he refused the application. The Master of the Rolls in *In re Joseph Crosfield & Sons, Ld.* (1) pointed out exactly the ground upon which the preliminary order ought to be made and what the effect of it was.

In my opinion, when once the order is made and the application proceeds, then it should be dealt with on the merits, and if upon the merits it fails, that is not a reversal of the previous order or an appeal from the previous order at all.

(1) [1910] 1 Ch. 130.

I agree with the opinion of the Master of the Rolls with regard to the proper construction of the section.

The Court then proceeded to hear the appeal on its merits and counsel for the appellant read the declarations filed in support of the original application for registration.

Comyns Carr, for the appellant. The declarations are made by the managing director of the respondent company and three dealers all located in London, and the evidence is confined to one town in the British Isles and is not nearly sufficient to establish that universality which is required for distinctiveness within s. 9.

Colefax, K.C., for the respondent company. There was no question of evidence in the Court below; the case was argued on the point of law alone. At the time of the original application the evidence was considered sufficient, but that was before the decision in *In re R. J. Lea, Limited's Application*. (1)

The COURT after some further discussion adjourned the hearing of the appeal on its merits, in order to enable the respondent company to supplement their original declarations by one affidavit upon which the appellant was to be at liberty to cross-examine.

R. M.

The appeal came on again for hearing on June 20.

An affidavit by John Hurst, shops manager to Salmon & Gluckstein, Limited, and A. J. Jones, Limited, was read. The deponent stated that in all his companies' branches the expression "Teofani's cigarettes" was taken as denoting the goods of Teofani & Co., Limited. In cross-examination he stated that packets of cigarettes had been sold with a label or wrapper bearing the name "Teofani" for over fifteen years and that the sale of "Teofani's cigarettes" had been very large.

An affidavit filed by A. Teofani in reply was also read.

Comyns Carr, for the appellant. A surname cannot be registered under this Act. In s. 9, par. 5, the word "name" means the complete name; it does not include a surname which

(1) [1913] 1 Ch. 446.

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is only a part of a name. In par. 4 "surname" is particularly used. It is suggested that a surname may be a distinctive mark and as such entitled to be registered, but I submit that it cannot.

[*Colefax, K.C.*, referred to *In re Whitfields Bedsteads' Application* (1).]

"Lawson Tait," the name there used, was not a surname, it was a complete name. That case does not therefore apply. This case is rather governed by *In re Pope's Electric Lamp Company's Applications* (2) and *In re R. J. Lea, Limited's Application.* (3) The reasoning of Joyce J. in the latter case is applicable here. The mere fact that a person bearing the same name may desire to trade in his own name is sufficient to shew that a surname should not be registered.

[COZENS-HARDY M.R. Your case is easier than *In re R. J. Lea, Limited's Application* (3) because there the name in question was not that of the applicant himself.]

Yes, that is so. Under the previous Acts there was no definition of a non-registrable trade mark. Previous to the Act of 1905 there could have been no use of "Teofani" as a trade mark. Evidence on the point would have been inadmissible or irrelevant. Sect. 44 of the Act may seem to support the view that a surname may be registered, but there is no mention of "surname" in the section.

Colefax, K.C., and *Maugham*, for the respondents. The Court may hold that no surname can be registered, but it cannot reasonably be said that this name is not distinctive, i.e., adapted to distinguish, because on that point the evidence of the respondents has been limited. The position of a person who is on the register is different from that of an applicant for registration. The registration of "Teofani" does not prevent the appellant from trading honestly in his own name of Athanasius Teofani: s. 44 of the Trade Marks Act, 1905. The question is whether that use is bona fide. But if the name has become a brand name it will prevent him from doing so. It depends on whether the name of the particular trader has in the market come to denote

(1) [1909] 2 Ch. 373. (2) [1911] 2 Ch. 382.
(3) [1912] 2 Ch. 32.

his goods: *Jamieson & Co.* v. *Jamieson.* (1) But no man is entitled to pass off his goods as those of another by selling them under a name which is likely to deceive purchasers: *Reddaway* v. *Banham.* (2) Subject to that the defendant may sell cigarettes manufactured by himself in his own name, but may not call them "Teofani cigarettes." This point has nothing to do with "get-up."

[COZENS-HARDY M.R. referred to *Burgess* v. *Burgess.* (3)]

That case does not decide that a man may use his own name so as to deceive. It was the intention of the Act to permit registration of a surname. Undoubtedly surnames could be common law trade marks. If a name has acquired a secondary meaning other traders must be careful to distinguish their goods. In the present case the use of the initial "A." is not enough distinction. The Court will not absolutely restrain a trader from using his own name, but will grant an injunction to restrain him from doing so so as to deceive: *J. & J. Cash, Ld.* v. *Cash* (4); *Turton* v. *Turton* (5); *Valentine Meat Juice Co.* v. *Valentine Extract Co.* (6); Kerly on Trade Marks, 3rd ed. p. 535.

[KENNEDY L.J. referred to *S. Chivers & Sons* v. *S. Chivers & Co.* (7)]

Under the old law the word "distinctive" meant distinguishing a particular person's goods from those of other people: *Perry Davis & Son* v. *Harbord* (8); *In re R. J. Lea, Limited's Application.* (9) The mark must come within s. 9 of the Act of 1905. Sect. 9, par. 4, shews that "word" includes a surname. By s. 3 a "mark" includes a "name" and a "word." We contend that a surname comes under "word," not under "name," and is registrable under s. 9, par. 5: *In re Joseph Crosfield & Sons, Ld.* (10) The fact that a person is entering on a trade in which some one else has a well-known trade mark does not alter the rule as to "distinctive."

This trade mark cannot be removed from the register unless

(1) (1898) 15 Rep. Pat. Cas. 169, 192.
(2) [1896] A. C. 199.
(3) (1853) 3 D. M. & G. 896.
(4) (1902) 19 Rep. Pat. Cas. 181.
(5) (1889) 42 Ch. D. 128.
(6) (1900) 17 Rep. Pat. Cas. 673.
(7) (1900) 17 Rep. Pat. Cas. 420, 427.
(8) (1890) 15 App. Cas. 316, 320.
(9) [1913] 1 Ch. 446, 452.
(10) [1910] 1 Ch. 130.

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the Court holds that no surname can ever be registered. No doubt there is a discretion, but that discretion has already been exercised, and it is not suggested that it was not properly exercised, or that the evidence was insufficient. *In re Whitfields Bedsteads' Application* (1) is in our favour. The name Teofani has acquired a secondary meaning, and it is a foreign name unknown in this country.

It is most important to keep this trade mark on the register with a view to trade in foreign countries. By the conventions with some countries a person is not allowed to have a trade mark abroad unless it is registered in his own country. That is why s. 9, par. 5, was introduced to enlarge the number of common law marks which were capable of registration. Sect. 44, taken in conjunction with s. 9, shews that it was the intention of the Act to allow registration of surnames. Old marks, including surnames, could be registered under s. 64 of the Act of 1883 if they were distinctive; and the Court will not give the Act of 1905, which is an enlarging Act, a more narrow construction than that. Many names of animals have been registered under the old Acts, and many of those names are also surnames; but it is not suggested that every name which can be shewn to be also a surname must be taken off. User as a trade mark means user on the goods themselves : *In re J. B. Palmer's Trade Mark.* (2) Rules 35 to 41 of the Trade Mark Rules, 1906, contemplate the registration of surnames. The word "distinctive" is taken from the Trade Marks Act, 1875 : *In re Wood's Trade Mark.* (3)

Austen-Cartmell, for the Comptroller. Surnames come within s. 9, par. 5, of the Act of 1905 and are capable of being distinctive. There appears to be nothing to prevent a surname in itself from being registered. The name "Teofani" merely denotes proprietorship; it does not denote a specific article as Wellington boots or Gladstone bags. Those names did not shew who were the makers. The Board of Trade is neutral in the matter, but it is to be observed that there is no evidence of user of the name as a trade mark before the date of the application. A surname

(1) [1909] 2 Ch. 373, 381. (2) (1883) 24 Ch. D. 504.
(3) (1886) 32 Ch. D. 247.

without any addition is not enough to be distinctive: *In re Benz et Cie.'s Application.* (1) The Board of Trade is cautious in registering surnames, but does not take the view that they are incapable of registration.

Comyns Carr in reply. The name "Teofani" has not acquired any secondary meaning. It is not adapted to distinguish the goods within s. 9, par. 5; it is more likely to cause confusion. The name "Teofani" cannot be registered because it is only the name of the owner of the goods, and no one can say that there is not some one else of the same name who is a cigarette maker. It can only be registered if it has acquired a secondary meaning. A great reputation is not enough. It must be shewn that it has lost the meaning of the individual and only denotes his goods. The primary meaning must be lost before the secondary meaning is acquired. Under r. 64 if there is no opposition the Registrar is bound to register the mark, so there is no question of discretion. Under s. 35 the Court has power to review the exercise of discretion by the Board of Trade or the Comptroller.

The user which has to be proved under s. 9 is user as a trade mark before the registration. User by advertisement in newspapers will not do.

Then as to the question of passing off. What is it the defendant is said to have done? There is no evidence of actual trading or of deception. The plaintiffs' case is that "Teofani" has acquired a secondary meaning and that therefore the defendant is bound to sufficiently distinguish his goods. But it is submitted that no secondary meaning has been acquired. The use by a defendant of his own name cannot be restrained unless the name has ceased to represent an individual and has come to mean a particular thing: *Burgess* v. *Burgess.* (2)

[SWINFEN EADY L.J. referred to the judgment of Chitty J. in *M. Melachrino & Co.* v. *Melachrino Egyptian Cigarette Co.* (3) to shew that a man can commit a fraud even by using his own name.]

A man cannot be restrained from using his own name unless

(1) (1913) 30 Rep. Pat. Cas. 177, 180.
(2) 3 D. M. & G. 896.
(3) (1887) 4 Rep. Pat. Cas. 215, 220.

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(1.) either the name has come to mean some particular thing, or (2.) he has done something else, e.g., adopted some other part of the plaintiff's label or mark: *Turton* v. *Turton.* (1)

[SWINFEN EADY L.J. Is your proposition that a man may pass off his goods as those of another if he can do so merely by the use of his own name?]

All that is proved here is that the plaintiff company have established a reputation for their goods. That is not enough to entitle them to an injunction: *John Dewar & Sons, Ld.* v. *J. H. Dewar* (2); *Dunlop Pneumatic Tyre Co.* v. *Dunlop Motor Co.* (3); *British Vacuum Cleaner Co.* v. *New Vacuum Cleaner Co.* (4)

Colefax, K.C., and *Maugham*, for the respondents, were not called upon on the question of passing off, and the Court then dealt with that part of the case in the following judgments, and intimated their intention to reserve judgment upon the question as to the trade mark.

COZENS-HARDY M.R. This is an appeal from an order of Warrington J., who granted an injunction restraining the defendant Athanasius Teofani, his servants and agents, "from selling or offering for sale cigarettes as A. Teofani's cigarettes or otherwise marking his goods with the name of Teofani, either with or without other names, without clearly distinguishing such cigarettes from the cigarettes of the plaintiffs and from infringing the plaintiffs' registered trade mark."

Now there are two points. The second is as to the trade mark, which stands over for the present, and I prefer to deal with the first point separately. Is it right to grant an injunction, assuming that there is no registered trade mark with the name Teofani in the terms which have been used? In my opinion plainly it is.

The principle of law is not in doubt. It is perfectly true hat a man is entitled to carry on a business in his own name, and that is a general proposition which will not in any way be

(1) 42 Ch. D. 128.
(2) (1900) 17 Rep. Pat. Cas. 341, 358.
(3) (1906) 23 Rep. Pat. Cas. 761, 770.
(4) [1907] 2 Ch. 312.

disputed. But in *Burgess* v. *Burgess* (1), which was relied on by the appellant, there is nothing which really assists him. Turner L.J. put the case with his usual extreme accuracy when he said: "Where a person is selling goods under a particular name, and another person, not having that name, is using it, it may be presumed that he so uses it to represent the goods sold by himself as the goods of the person whose name he uses; but where the defendant sells goods under his own name and it happens that the plaintiff has the same name, it does not follow that the defendant is selling his goods as the goods of the plaintiff. It is a question of evidence in each case whether there is false representation or not." I do not think there is any case in which any doubt is expressed that that is the true principle of law. It is said in the present case that there is no evidence that the defendant has sold his goods or has threatened or intended to sell his goods in such a manner as to represent them as the plaintiffs' goods. Of course that is a matter which requires consideration, and to which I have given such consideration as I can.

What are the salient and admitted facts here? For thirty years—from 1882 I think—the respondents Teofani & Co., Limited, or their predecessors in title have carried on in London a very large and extensive business as sellers of cigarettes. We have had any number of exhibits before us, from which it was quite clear that the name Teofani alone is placed upon their goods. They have been sold throughout the United Kingdom in enormous quantities by the plaintiffs or their predecessors in title; and they have undoubtedly got a reputation as manufacturers of cigarettes which they sell under the name Teofani. But what is the defendant? He is a fellow countryman of the original Teofani, and I presume of the present director of the company. He was in some position, not that of partner, but he was in some position in connection with the present firm or their predecessors. I think it was in 1906 that he absolutely left them. What he did in the interval between 1906 and 1911 or 1912 I am not quite sure. I think it was stated that he was engaged in various occupations in rather a humble way

(1) 3 D. M. & G. 905.

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but at the end of 1911 he came over to England with I think 35*l.* as his sole capital and he was minded to do that which he had a right to do, namely, to make and sell cigarettes. There is nothing in this injunction which prevents him making and selling cigarettes, but it is impossible I think to overlook this, that a man without means was minded to use the name of a well-known firm, which was also his own; but that imposed upon him a special and particular obligation, which I for one should be very slow in any way to minimize, to be extremely careful in what he did. There was a peculiar obligation upon him so to carry on his business as not to lead people to believe that the goods he was offering for sale were the goods of the plaintiffs. Now what has he done? His name is Athanasius Teofani. He does not put "Athanasius Teofani" upon his boxes, or anywhere. He puts "A. Teofani," and he does not give any address. He offers for sale in a box "A. Teofani's Non Soluk cigarettes, made from the best growths of Turkish tobacco, guaranteed not to contain soluk of any kind whatsoever."

There was a large amount of evidence before Warrington J. which made him believe, and certainly would make me believe, and I think I should be right in saying on the same evidence, and on the principle laid down by Lord Halsbury in the *Manchester Brewery Case* (1), that this box putting forward "A. Teofani's Non Soluk cigarettes" without any address is a representation, and intended to be a representation, to the public that this was a new brand of cigarettes made by the well-known Teofanis. The very object of putting "A. Teofani's cigarettes" at the top seems to me to be to represent that this is a new brand introduced by Teofani, whose name everybody in this country knows. You see this and conclude that it is a new brand made by the well-known firm. "But," said counsel for the appellant, "you cannot prevent the defendant using his own name in selling cigarettes." Of course not, and the judgment under appeal does not say that. It was pointed out by Parker J. on an interlocutory application that if the defendant would strike out the words "A. Teofani" at the top and simply put "Non Soluk cigarettes

(1) *North Cheshire and Manchester Brewery Co.* v. *Manchester Brewery Co.* [1899] A. C. 83.

made by A. Teofani" and the address where they are made—if there was any address where they were made—then there would be no injunction granted. But the defendant declined to do so. He came to trial claiming this right. It was contended on behalf of the appellant that he had a right to use his own name in any position and any type and under any circumstances so long as it is his own name. All I can say is that I entirely and emphatically disagree with any such doctrine. The passage from the judgment of Chitty J. in *M. Melachrino & Co.* v. *Melachrino Egyptian Cigarette Co.* (1) which Swinfen Eady L.J. read seems to me to state the law with perfect accuracy. I have not intentionally and I have not in fact, I hope, departed in the least from anything which Chitty J. said there. I cannot bring myself to doubt that in a case like this you are bound to look at all the circumstances affecting the defendant. And with reference to the plaintiffs, you are bound to have regard to the fact that the defendant was alleging, as has been proved by a number of people, that he was a partner with Teofani when he was not, and the judge has so found; and you have the fact that he is a man with no capital and no means, who came over here with a small sum in his pocket and started a business of the nature and in the manner which I have stated. It is said that there is no proof that anybody has been deceived. That is not necessary. It is quite sufficient if the Court comes to the conclusion that it is calculated and intended to deceive, or, apart from intention to deceive, that it is calculated to deceive whether it is so intended or not.

In the present case I certainly have arrived at the conclusion not only that what was done is calculated to deceive, but that it was intended to deceive, and that being so, there seems to me to be no practical difficulty in holding that the view taken by the learned judge was perfectly right, and that Athanasius Teofani must be restrained, not from making cigarettes, not from carrying on the business of a cigarette maker under his own name, but he must be restrained from "selling or offering for sale cigarettes as A. Teofani's cigarettes or otherwise marking his goods with the name of A. Teofani, either with or without other names,

(1) 4 Rep. Pat. Cas. 215, 220.

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without clearly distinguishing such cigarettes from the cigarettes of the plaintiffs."

In my opinion the judgment of the learned judge was perfectly right on this part of the case, and the appeal, so far as it relates to the action of deceit, must be dismissed.

KENNEDY L.J. I am entirely of the same opinion. It seems to me that one does not get much assistance from comparing cases which on a question of passing off must have depended on their own particular facts. As I understand the law there is nothing to prevent a person who is setting up in a trade in which there are already others of the same name from using his own name, but alike from the legal and from the moral point of view a person is forbidden to use his own name in connection with the goods in that business in such a way as to represent that the goods are the goods of somebody else of that same name. If he does that he is doing that which is wrong and which the Courts, as it seems to me, have consistently through a long list of cases refused to allow him to do. He must carry on the business under his own name honestly, and he does not carry on the business in his own name honestly if he so uses his name in connection with the business or goods—in this case it is the goods—as to lead those who deal with him in that business as purchasers to believe that they are goods which are the goods of another trader of the same name. In this case the defendant has to my mind not honestly carried on the business; he has not so chosen to carry it on; he has chosen to use his name in such a way as to mislead. He might, as my Lord has said and as Parker J. has pointed out already in concrete form, clearly and easily have used his name so as to give him that which the use of the name ought to give to a trader, namely, to shew that they are his own goods that he is selling and for which he asks a popularity and success; instead of which the defendant has used the name in such a way that, as the learned judge has found and I think quite rightly found, he was misleading, and must have known he was misleading, those with whom he dealt into the belief that they were the goods of somebody else.

Under those circumstances I am not going to prolong this

case by referring to any of the authorities. I will only say that the two which seem to be relied on by Mr. Comyns Carr, who has put every possible point, *Burgess* v. *Burgess* (1) and *Turton* v. *Turton* (2), when examined appear to me not in any way to help him. They restated the proposition of law as I think it has been stated before and as we are stating it here. They deal with the particular facts which justified the conclusion in each case without doubt; but it is quite hopeless to say that a man may so use his name as to take away, or to appropriate I should perhaps rather say to himself, the business or the goods of another firm of the same name. He must be prevented from carrying on a practice which is alike against law and against fairness.

SWINFEN EADY L.J. I am of the same opinion. The law is that no man may pass off his goods as and for the goods of another; and that proposition of law may be amplified, and be perfectly accurate, if it is put in this way, that a man may not by the use of his own name or otherwise pass off his goods as and for the goods of another.

In this case I am convinced that the action of the defendant is fraudulent and intentionally fraudulent. It is a case in which the defendant, having been previously employed in the business of the plaintiffs, after a long interval of time returns and is proposing to start a new business. He is without capital except a sum of 35*l.* and he is proposing to start upon that a wholesale business; he borrowed another sum of 20*l.*, but he says that he has paid that back to his solicitors. He is, of course, fully aware of the business carried on by the plaintiffs and of their reputation. In cross-examination he said that Teofanis, that is the plaintiffs, "have a reputation, and, as long as there is no other firm, Teofani means the goods of the plaintiff company. I have represented that I am Teofani." He was fully aware therefore of the character and extent of the plaintiffs' trade, and what does he do? An early step is to enter into an agreement with the solicitors under which he charges all his right, title, estate, claim, share and interest whether legal or equitable in certain property

(1) 3 D. M. & G. 896. (2) 42 Ch. D. 128.

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set out in the schedule, and when you turn to the schedule you find that item A is the interest in the partnership property or otherwise of the firm of Teofani & Co.—that is the plaintiffs' firm—or their predecessors before the limited company was registered. He also set up a claim for a partnership. Then item B is the share and interest under the will of his father, Basil Teofani; then comes item C, the right of user of the name "Teofani in the manufacture and selling of cigarettes, tobacco, and cigars, and in the registration of the name." Now what was there of value to pledge in the name of Teofani as representing the name of the defendant? He is a man who has returned here with a small sum in his pocket intending to embark in the trade. Supposing his name had been something entirely different, what was the value of pledging his name? The value of the plaintiffs' name, they having an extensive trade, goes without saying, and to my mind it is obvious, but it would be waste of time to comment on it, that this document of itself shews a fraudulent intent; it shews an intention of charging the user of the name in connection with cigarettes and of attempting to register that name in the class of tobaccos and cigarettes, and is an endeavour to appropriate by the user of that name the plaintiffs' business. It was said long ago that the Courts will not attempt to define fraud or to lay down the limits of fraud, and it would be entirely a new thing to say that there is one way by which a person is allowed to represent his goods as the goods of another, though he does it fraudulently, and that is if the only fraud that he resorts to is the fraudulent use of his name or of some part of his name. I entirely dissent from that. I am quite satisfied that this case is a fraudulent one, and that the order of the Court below was absolutely right.

Colefax, K.C., was then further heard in reply upon the question of the user required to prove distinctiveness under s. 9. There is no need under s. 9, par. 5, to prove that the mark which is sought to be registered has been used as a trade mark before the application. A mark may be distinctive without its ever having been used as a trade mark. "Bass" was never used as a trade mark in the way in which it is registered. User for

the purposes of the last paragraph of s. 9 can well be user in connection with the goods by advertisement or otherwise. It may be that there are few names which are distinctive, but on the evidence this is one of them. To hold that this mark should not be registered would be to say that no surname can be registered. The mark is on the register and should not be taken off. [He also referred to ss. 3 and 39 of the Act of 1905.]

Austen-Cartmell, for the Comptroller. User as a trade mark in s. 9 means user as a trade mark as defined by s. 3, i.e., upon or in connection with goods, but still there must be user as a trade mark. The evidence before the Board of Trade did not shew that "Teofani" had been used as a trade mark in connection with the goods. To admit user by advertisement would be a great extension.

Cur. adv. vult.

July 11. COZENS-HARDY M.R. We have already decided that it is competent to the appellant to apply to rectify the register on the ground that "Teofani" was improperly registered as a trade mark, and we allowed evidence to be adduced which was not before Warrington J.

The substantial question in this appeal is whether a surname can under any circumstances be registered as a trade mark. That depends upon the construction of s. 9 of the Trade Marks Act, 1905, which defines "registrable trade mark." It mentions first certain marks which can be registered without any application to the Board of Trade or the Court, and next, certain marks which can only be registered if an application is permitted to proceed by order of the Board of Trade or the Court. It is clear that a surname does not fall within the first class, for it is not within par. 1, "the name of an individual," but only part of his name, and it is not within par. 4, because according to its ordinary signification it is expressly excluded. It is, however, a "word" within par. 5, and as such becomes registrable if the Board of Trade or the Court allow the applicant to proceed. But it must be a "distinctive mark," i.e., "adapted to distinguish the goods of the proprietor of the trade mark from those of other persons." It is in precisely the same position as a geographical

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name, which has been held in this Court to be capable of being "distinctive" and entitled to be deemed a registrable mark if an order of the Board of Trade has been obtained. The judgment of Farwell L.J. in *In re R. J. Lea, Limited's Application* (1) is important on this point.

For the present purpose, I can see no distinction between a geographical name and a surname, except that I think a surname is more open to objection than a geographical name. Where the surname is not that of the proprietor, it is more easy to justify its claim to be a trade mark than where the surname is that of the proprietor. It is only in very exceptional circumstances that such an application ought to be allowed to proceed. If my name is John Smith, the name Smith may indicate that the goods are not made by Brown, but it is not adapted to distinguish my goods from those of any other person who has the surname Smith. But the surname may be so peculiar, and its user may have been so extensive, that it has in fact become "distinctive" of the proprietor's goods. The clause at the end of s. 9 seems to me to shew that it cannot be said that a surname is under no circumstances a registrable trade mark.

I am aware that the opposite view was taken by Warrington J. in *In re Pope's Electric Lamp Co.'s Applications* (2), and also, though less strongly, by Joyce J. in *In re R. J. Lea, Limited's Application.* (3) But when this last case came to the Court of Appeal (4) it was not contended that a surname is not per se registrable: see p. 451. So that the affirmance by this Court of the decision of Joyce J. cannot be taken to be an adoption of his view on this point. It is therefore open to me to hold, as I do hold, that a surname is not necessarily incapable of being a registrable trade mark. If, as I think, a surname is not incapable of being a registrable trade mark, it seems to me that the present is one of those exceptional cases in which the order of the Board of Trade cannot be considered improper, although even in this case I think the Board of Trade might well have refused the application. The name "Teofani" is very uncommon. So far as I am aware, the predecessors of Teofani

(1) [1913] 1 Ch. 453.
(2) [1911] 2 Ch. 382.
(3) [1912] 2 Ch. 32.
(4) [1913] 1 Ch. 446.

& Co., Limited, and the present appellant Athanasius Teofani are the only persons of that name within the United Kingdom; and the user of that name as a trade mark for twenty years at the least has been so extensive as to have made it in fact distinctive for cigarettes.

It is right to refer to s. 44, which prevents the registration of "Teofani" from interfering with the bona fide use by Athanasius Teofani of his own name.

In my opinion the appeal must be dismissed.

KENNEDY L.J. That which we have to consider in this case is an application that the register of trade marks should be rectified by the removal of the trade mark "Teofani," for the registration of which Teofani and Co., Limited, obtained an order of the Board of Trade in 1909, under s. 9, par. 5, of the Trade Marks Act, 1905.

I have had the opportunity of reading and considering the judgment which has just been delivered by the Master of the Rolls, and as I agree with its tenor and conclusion, I may confine my judgment within a very small compass. The mark in question is one which might be registered under s. 9, par. 5, as a "word," provided that the word is "distinctive" in the sense of that expression as used in the section, i.e., adapted to distinguish the goods of the proprietor of the trade mark from those of other persons. The mark in the present case was accepted as registrable by the Board of Trade as being in that sense "distinctive," and I am not prepared to say, upon the evidence, that the acceptance was wrong. I think that the language in regard to the registrable character of a surname used by Warrington J. in the case of *In re Pope's Electric Lamp Co.'s Applications* (1), and by Joyce J. in the later case of *In re R. J. Lea, Limited's Application* (2), goes too far in the direction of exclusion. I wish, however, at the same time, to add that, in my opinion, an application for the admittance of a surname to registration ought to be most closely scrutinized, and the acceptance of it obtained only where its distinctive character is quite clearly proved. It is no argument against this view that a certain degree of protection

(1) [1911] 2 Ch. 387. (2) [1912] 2 Ch. 41.

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is given to other persons having the same surname by s. 44 of the Act. I desire to adopt the language of the considered judgment of Farwell L.J. in *Lea's Case* (1) that "When the Legislature has shewn that certain words are prima facie not included, the Court ought to be careful in exercising a discretionary jurisdiction to enlarge such area, and should remember that the owner of a trade mark under the Act enjoys a monopoly after seven years for all time and over the whole of the United Kingdom." And a little lower down on the same page, "It must be prima facie wrong to allow a mere surname either with or without prénom to be used as distinctive, because every one has a prima facie right to trade in his own name, and ought not to be hampered in its use, unless such name has become so completely identified with some article as to be a household word for such article."

I agree that judgment should be given in favour of Teofani & Co., Limited.

SWINFEN EADY L.J. The applicant—Athanasius Teofani—appeals from the refusal of Warrington J. to rectify the register of trade marks by the removal of the mark therein registered in class 45, and numbered 312,065. The grounds of this application, as stated in the notice of appeal, are that the alleged trade mark is not a trade mark capable of being validly registered within the provisions of the Trade Marks Act, 1905. The mark consists of the word "Teofani" and was registered by Teofani & Co., Limited, on December 20, 1909. Teofani & Co., Limited, were incorporated in the year 1908, and took over the business of tobacco and cigarette manufacturers of Teofani & Co., which business was established in the year 1887, and was carried on continuously under such name until taken over by Teofani & Co., Limited, in the year 1908.

By an order of Parker J. dated May 10, 1912, the applicant was ordered to deliver particulars of objections to the respondents' trade mark. Some of the objections delivered seem to refer more to the action then pending against him than to the registration of the trade mark, but objections 3 and 4 amount to this—

(1) [1913] 1 Ch. 453.

that the word "Teofani" is not in its nature adapted to distinguish the goods of Messrs. Teofani & Co., Limited, from those of other persons, and in particular from the goods of the applicant. There was considerable evidence before the Registrar that the word "Teofani" had been extensively used and advertised and was in fact distinctive of the goods of Teofani & Co., Limited, and the evidence filed on the appeal makes it clear that the word "Teofani" had been extensively used in Great Britain as a trade mark, and has hitherto served to distinguish the goods of Teofani & Co., Limited, and their predecessors in trade from the goods of all other persons. The applicant has not disputed this evidence, and has not filed any evidence in opposition to the evidence of the respondents, or in support of his application to take the mark off the register.

His argument on the appeal has been that no surname can be properly registered as a word mark under s. 9, par. 5, of the Act of 1905. He has contended that no word which is a surname can be "adapted to distinguish" the goods of the person applying to register from the goods of all other persons, as although such word may for a time serve such purpose, if the person registering is the only one of that name in the trade, yet it ceases to be "adapted to distinguish" as soon as another person of the same name enters the trade. In fact, the applicant insisted that a word being a surname is incapable of registration under s. 9, par. 5.

If a surname can ever be properly registered as a word mark, the evidence establishes that the registration in the present case was right and proper. So that the question really is whether, according to the true construction of the statute, a surname can ever be properly registered as a word mark. By s. 9 of the Act, par. 1, certain names, by par. 2 certain signatures, and by pars. 3 and 4 certain words may be registered as trade marks, without any preliminary order of the Board of Trade or of the Court.

Any other name, signature, or word not coming within one of those four paragraphs requires a preliminary order before it can be deemed a distinctive mark, capable of registration.

Although a word may happen to be used as a geographical

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name in some part of the world, if, according to its ordinary signification, it is not a geographical name, it may be registered without any preliminary order.

It has been decided that if a word is geographical according to its ordinary meaning it may still be registered in a proper case by order of the Board of Trade or the Court. Instances of this are *In re "Apollinaris" Trade Mark* (1), for "Apollinaris," which had been held in former litigation to be a geographical word (see [1891] 2 Ch. 186, at p. 221); *In re National Starch Co.'s Application* (2), for "Oswego," in New York State; *In re California Fig Syrup Co.* (3), where the application which was allowed to proceed had reference to the four words "California syrup of figs," but the only element of distinctiveness was the word "California"; and *In re R. J. Lea, Limited's Application.* (4)

A surname is a word, and therefore is prima facie registrable upon an order of the Board of Trade or the Court being obtained. Again, s. 44 assists the view that the Act contemplates that a surname may be registered as a word, as no registration under the Act can interfere with any bona fide use by a person of his own name. Thus it is not open to argument that a person by registering a surname obtains a monopoly of the use of that word. Every person may still bona fide use his own name, although part of his name may be the registered surname. In *In re Joseph Crosfield & Sons, Ld.* (5) Fletcher Moulton L.J. discussed the new departure in trade mark legislation made by the new provisions in s. 9, par. 5, of the Act of 1905: "To my mind they"—that is these provisions—"are chiefly directed to remedy two well-known defects in the working of the previous legislation. In the first place, the exclusion of words under that legislation was by whole classes. But, though it may be desirable in general to exclude from registration words of a particular class, it by no means follows that every individual word in that class would be objectionable as a trade mark in the case of every kind of goods. For example, few would doubt the desirability of excluding geographical terms as a class. But if

(1) [1907] 2 Ch. 178.
(2) [1908] 2 Ch. 698.
(3) [1910] 1 Ch. 130.
(4) [1913] 1 Ch. 446.
(5) [1910] 1 Ch. 144.

as suggested during the argument, a trader desired to register Monte Rosa for cigarettes, or Teneriffe for boiler plates, no practical inconvenience would arise from his doing so. The second defect was more difficult to remedy, but, on the other hand, it affected cases that had strong claims on their merits. It often occurs in trade that by continued use words get recognized as denoting the goods of a particular firm. These words may in themselves be unsuitable to be chosen as trade marks, but they have in fact become so. The oft quoted case of 'Yorkshire Relish' is one example of this, and the words 'Worcester Sauce' would almost certainly have been another example had the original makers of the article exercised due vigilance in protecting their rights. Apart from the Trade Marks Acts there would be nothing to prevent such words becoming trade marks in the eye of the law, and it was an obvious defect in the earlier legislation that it failed to give the benefits of registration to such marks when they had become duly established. The present Act seeks to remedy these defects by abandoning the policy of absolute exclusion of all the members of specified classes of words and substituting therefor a judicial examination of the merits of each individual case, and leaving the Court free to pronounce the word or words to be eligible for registration if on such an examination it holds it proper to do so."

It is not for the Court to lay down a rule excluding all surnames from registration, when the statute has left the matter entirely open—left it to be determined, as a question of fact in each case, whether the word is in fact distinctive. The quality of distinctiveness may be inherent in the word selected, but it may also be acquired, and the statute in terms allows evidence of acquired distinctiveness to be adduced. In my opinion a surname is capable of being a registrable trade mark, and "Teofani" was properly registered in the present case.

I wish, however, to add that caution is necessary in admitting surnames to registration, and the circumstances in which registration should be allowed are exceptional. Much would depend on the word itself, whether it is a surname of unusual occurrence in the United Kingdom, or whether it is a name not infrequently met with; and again whether the application is made after the

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word has been in use as a trade mark for some time, and there is evidence of distinctiveness acquired by user, or whether the application refers to a mark "proposed to be used" but not yet in actual user. The appeal should be dismissed.

Solicitors for appellant: *Carter & Bell.*

Solicitors for respondents: *McKenna & Co.*

Solicitor for the Comptroller: *Solicitor to the Board of Trade.*

G. A. S.

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In re MARKE WOOD, SENIOR.

In re MARKE WOOD, JUNIOR.

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[1912 W. 1643.]

Will—Settlement—Construction—Hotchpot Clause—Several Settled Funds—Trusts by Reference.

A testator gave three separate funds to trustees upon trusts, fully set out in each case, for his three children respectively for life, with remainder to their issue as they should respectively appoint, and in default of appointment to their respective children in equal shares with a hotchpot clause. In each case the testator gave the fund over, on failure of the express trusts, upon trusts in favour of his other children and their issue successively, by reference to the trusts expressly declared in favour of such children and their issue concerning the fund given in trust for them in the first instance.

In the events which happened, a granddaughter of the testator became entitled to one fund by appointment, and to a share in another fund in default of appointment:—

Held, affirming the decision of Neville J. [1913] 1 Ch. 303, that the granddaughter was entitled to take her share in the unappointed fund without bringing into hotchpot the fund which she took by appointment.

APPEAL from a decision of Neville J. (1)

James Marke Wood by his will, after appointing executors and trustees, gave the sum of 45,000*l.* to his trustees upon trust to invest the same as therein mentioned, and out of the income

(1) [1913] 1 Ch. 303.

thereof to pay to his son William Palgrave Wood until he should attain the age of twenty-five years the yearly sum of 700*l.* and to accumulate the residue of such income at compound interest, and so soon as his said son should attain the age of twenty-five years to raise out of the trust funds and the accumulations thereof and pay to him the sum of 20,000*l.* and to stand possessed of the residue of the said sum of 45,000*l.* and the accumulations thereof "Upon the trusts following that is to say In trust to pay the dividends interest and income thereof to my said son and his assigns during his life with power to him by deed or will to appoint that after his decease the whole or any part of such dividends interest and income shall be paid to any wife of his or who may survive him during her life or for any less period and from and after his decease and subject to any appointment which may be made to his wife as aforesaid in trust for all or such one or more exclusively of the other or others of the children and remoter issue of my said son (such remoter issue being born in his lifetime) at such ages or times age or time in such shares if more than one and in such manner as my said son by any deed or deeds with or without power of revocation and new appointment or by his will or any codicil thereto shall appoint and in default of such appointment and so far as any such appointment shall not extend in trust for the children of my said son who being sons shall attain the age of twenty-one years or being daughters shall attain that age or marry in equal shares and if there shall be only one such child the whole to be in trust for that one child But so nevertheless that no child who or whose issue shall take a share under any such appointment as aforesaid shall (in default of appointment to the contrary) take any part of the trust funds remaining unappointed without bringing the share appointed to him or her or to his or her issue into hotchpot and accounting for the same accordingly." Subject to the trusts aforesaid the testator directed his trustees to stand possessed of the residue of the trust fund to arise from the investment of the said legacy or sum of 45,000*l.* and the accumulations of income thereof after the payment of the said sum of 20,000*l.* "Upon the like trusts for the benefit of my daughter Katharine Elizabeth Wood and her husband and issue as are hereinafter

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declared concerning the trust fund to arise from the legacy or sum of 30,000*l.* hereinafter bequeathed in trust for my said daughter her husband and issue and subject thereto upon the like trusts for the benefit of my said son James Marke Wood and his wife and issue as are hereinafter declared of and concerning the share of my said son James Marke Wood of and in my residuary personal estate And subject to the several trusts aforesaid in trust for the said William Palgrave Wood his executors administrators and assigns absolutely."

The testator then bequeathed the sum of 30,000*l.* to the same trustees upon trust to invest as therein mentioned and out of the dividends and income thereof to maintain and educate his daughter Katharine Elizabeth Wood until she should attain the age of twenty-one years or marry under that age with the consent of her mother or his trustees, and to accumulate the residue of such income, and if she should attain that age or marry with such consent to pay the income of the trust fund arising from the investment of the said sum of 30,000*l.* and the accumulations of income thereof to his said daughter during her life for her separate use without power of anticipation, and after her decease upon trusts set out in full in favour of his said daughter's husband, children, and issue precisely similar to those previously declared in favour of his son W. P. Wood and his wife, children, and issue of the said residue of the sum of 45,000*l.* with the same hotchpot clause. Subject to the trusts declared in favour of her daughter and her issue the testator directed his trustees to hold the 30,000*l.* upon trust in favour of his son W. P. Wood and his wife and issue, and subject thereto upon trusts in favour of his son J. M. Wood and his wife and issue declared by reference to the gifts in their favour respectively of the residue of the sum of 45,000*l.* and of two thirds of his general residue respectively thereinbefore and thereinafter mentioned, in the same words as the trusts declared by reference to the residue of 45,000*l.*, with an ultimate remainder in trust as his said daughter should by deed or will appoint, and in default of appointment if she should die unmarried for her absolutely, and if she should marry, in trust for such persons as would have been entitled thereto if she had died possessed thereof intestate and without having been married.

The testator gave his residuary estate after payment of debts, &c., to the same trustees, as to two thirds thereof upon trusts, fully set out, in favour of his son J. M. Wood and his wife and issue in all respects similar to the trusts thereinbefore declared in favour of his son W. P. Wood and his wife and issue of the said residue of the sum of 45,000*l.* with the same powers of appointment and the same hotchpot clause. And subject thereto the testator directed his trustees to hold one moiety of the two thirds upon trusts in favour of the said W. P. Wood and his wife and issue, and subject thereto upon trusts in favour of his said daughter and her issue declared by reference to the gifts in their favour thereinbefore fully set out as aforesaid, and as to the remaining moiety of the said two thirds upon trusts declared by reference as aforesaid in favour first of his daughter and her husband and issue, with remainder in favour of his son W. P. Wood and his wife and issue, with an ultimate remainder as to the whole two thirds in trust for his son J. M. Wood absolutely.

And the testator directed that the remaining third part of his residuary estate should be held upon trusts in favour of his son W. P. Wood and his wife and issue, with remainder as to one moiety thereof upon trusts in favour first of his said son J. M. Wood and his wife and issue, and subject thereto upon trusts in favour of his daughter and her husband and issue declared by reference in manner aforesaid to the trusts thereinbefore fully set out concerning the residue of the sum of 45,000*l.* and the sum of 30,000*l.* respectively, and as to the other moiety upon trusts in favour of first his daughter, her husband and issue, and subject thereto upon trusts in favour of his son J. M. Wood and his wife and issue declared by reference in manner aforesaid to the trusts thereinbefore declared of the legacy of 30,000*l.* and the two thirds of the residue respectively, with an ultimate remainder as to the whole of the said one third part in trust for his son W. P. Wood absolutely.

The testator died on March 1, 1879, and his will was duly proved on March 28.

The three children mentioned in his will all survived him, having attained twenty-one in his lifetime.

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James Marke Wood, the testator's son, died on December 27, 1908, having by his will appointed the two thirds of his father's residuary estate over which he had a power of appointment to his daughter Esther Rosamond, the wife of the Conte di Sant Elia. He had one other child, James Marke Wood the grandson, who attained the age of twenty-one, and died in 1903, in his father's lifetime, intestate, without having had any issue; his widow had married again and was now Mrs. Shewan.

There was a settlement executed on the marriage of the Contessa di Sant Elia, containing a covenant to settle after-acquired property, which her counsel admitted included the share she took under the will of James Marke Wood the elder.

The testator's son William Palgrave died on February 9, 1911, intestate and without having had any issue.

An originating summons was taken out by Katharine Elizabeth Wodehouse, the legal personal representative of the last surviving trustee of the will of James Marke Wood the elder, for the decision, among others, of the question whether upon the true construction of the wills of J. M. Wood the elder and J. M. Wood the younger the Contessa was entitled to one half share of the unappointed moiety of the one third share of the residue without bringing into hotchpot the two third shares appointed to her by her father's will.

The defendants were the executors of J. Marke Wood, junior, the trustees of the marriage settlement of the Contessa, the widow and administratrix of J. M. Wood the grandson, and the Conte and Contessa di Sant Elia.

Neville J. held that upon the true construction of the wills of J. M. Wood the elder and J. M. Wood the younger the Contessa was entitled to one half share of the unappointed moiety of the one third share of the residue without bringing into hotchpot the two third shares appointed to her by her father's will. From this decision the administratrix of J. M. Wood the grandson appealed.

P. O. Lawrence, K.C., and *A. àB. Terrell*, for the appellant. The real point is whether the effect of the referential trust is to constitute two funds with a hotchpot clause each, or one fund

with one hotchpot clause. It is submitted that the hotchpot clause in the original trust of the two thirds of the residue was undoubtedly put in to effect equality as to that part, and when the testator came to deal with the other share he still had the idea of equality in his mind, and that can only be carried out by adding the two funds together and making them subject to one hotchpot clause. That was the view taken by text-book writers until some recent decisions.

Prima facie, trusts by reference do not duplicate charges. That was clearly stated by Lord Cranworth in *Hindle* v. *Taylor* (1), approved in *Trew* v. *Perpetual Trustee Co.* (2), and referential trusts were dealt with in *Cooper* v. *Macdonald.* (3) Those were all cases of charges and run on the same lines, and we submit that hotchpot clauses are not duplicated any more than charges.

The present case is governed by *In re Perkins* (4), which is treated in Theobald on Wills, 7th ed. p. 776, as establishing that in the case of referential trusts there is to be prima facie one hotchpot clause applicable to all the funds. *In re North* (5) is distinguishable on the ground that in that case there were two instruments, and in *In re Marquis of Bristol* (6) the power of appointment was in different persons.

When once the trusts become identical and both funds are to devolve in the same way, then they merge and must be treated as one fund.

The decision in *In re Cavendish* (7), which was a case of a settlement by deed, was, we submit, quite wrong and if reviewed by this Court would not stand.

In *In re Beaumont* (8) there were separate settlors, separate funds, and separate sets of trustees, and that is quite different from the present case. See also *In re Fraser* (9), where the decision of Sargant J. in a somewhat similar case supports the contention now submitted on behalf of the appellant.

Upjohn, K.C., and *Tomlin*, for the respondents the trustees of the Contessa's settlement. In *In re Perkins* (4) North J.

(1) (1855) 5 D. M. & G. 577.
(2) [1895] A. C. 264.
(3) (1873) L. R. 16 Eq. 258.
(4) (1892) 67 L. T. 743.
(5) (1897) 76 L. T. 186.
(6) [1897] 1 Ch. 946.
(7) [1912] 1 Ch. 794.
(8) [1913] 1 Ch. 325.
(9) Ante, p. 224.

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found an intention on the part of the testator to treat the three funds as one fund; and that differentiates that case from this.

There are several different settlements on James Marke Wood the son and his family in this will, and the ultimate remainders in some instances are to J. M. Wood the son, and in others to William Palgrave Wood or Mrs. Wodehouse, and in face of that how is it possible to contend successfully that there is one hotchpot clause for all the settlements? What is there to shew an intention to amalgamate the two funds in question as distinguished from a mere intention to express trusts briefly by reference to another trust which the testator means should apply if the referential trust in question should ever take effect?

[COZENS-HARDY M.R. Could separate sets of trustees be appointed for each of the trusts?]

Yes, I think so. In *In re Perkins* (1) separate sets of trustees could not have been appointed, but here they could, so that there might be several separate sets of trustees, and when the funds from time to time came to be divided one set might not know what had been done years before with regard to the other funds, and how could such a state of things be met by one hotchpot clause?

[They were stopped by the Court.]

P. O. Lawrence, K.C., in reply. The hotchpot clauses in this will are intended to have implied cross operation. In Davidson's Precedents in Conveyancing, 3rd ed. vol. iii. pt. i. p. 170, it is said: "Where a settlement declares express trusts of one fund, and trusts by reference to the former of another fund, it is desirable that the hotchpot clause should exclude a child taking under an appointment from participating without account, in terms which apply not merely to the particular fund of which trusts are expressly declared, but to all the settled property, so as clearly to give to the express and implied hotchpot clauses a cross operation over the respective funds devolving in default of appointment." It is submitted that that is what has been done by this testator.

[COZENS-HARDY M.R. Is not the proper form given in Davidson?]

(1) 67 L. T. 743.

A clause is given in vol. iii. pt. i. p. 171, but it only differs very slightly from the clause in this will. Mr. Davidson in his note on *Montague* v. *Montague* (1) says: "It does not follow, however, that the same principle of decision would be applied to the case of an express and implied hotchpot clause contained in the same settlement."

[*Tomlin.* The most modern form of such a clause is given in Key and Elphinstone's Precedents, 9th ed. vol. ii. p. 544.]

This will was drawn in 1879, and looking at the particular hotchpot clause it is submitted that the words "any part of the trust funds remaining unappointed" refer to the residuary trust funds.

[COZENS-HARDY M.R. That point does not appear to have been taken before Neville J.; I think the clause can hardly bear that interpretation.]

As to the point that separate sets of trustees might be appointed of each trust fund, no doubt that might be so, so long as the different trusts had not coalesced; but it is suggested that here they have coalesced. The object of the testator was to secure equality among his grandchildren in default of appointment. The true principle of carrying that out is laid down by Lord Cranworth in *Hindle* v. *Taylor.* (2)

There is no object in keeping the funds separate when once they have, as here, coalesced. [He also referred to *In re Hetherington's Trusts* (3) and *In re Moss's Trusts.* (4)]

C. G. Church, for the legal personal representative of the last surviving trustee of the testator's will.

COZENS-HARDY M.R. Notwithstanding the able argument which has been presented to us by counsel for the appellant I have come to the conclusion that the decision of Neville J. was quite right.

The testator, who made his will in 1879, had two sons and one daughter; he was a man of very considerable wealth; he made provision for each son for life followed by provisions for their children and remoter issue, and also in a certain case the wife of each son was to have a life interest; but disregarding that, the

(1) (1852) 15 Beav. 565.
(2) 5 D. M. & G. 577.
(3) (1886) 34 Ch. D. 211.
(4) (1888) 37 Ch. D. 513.

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trusts were for the son for life, then for his children or issue as he should by deed or will appoint, and in default of appointment equally. There was a hotchpot clause applicable to the property so given to the son for life and to his family which, according to its plain and grammatical construction, is applicable to that property of which the son was made tenant for life, and that only. Then there is a provision made for the daughter, who again takes for life, and for her issue, with another hotchpot clause. It is contemplated on the face of the will that something must be done in the event which happened here of some one of the three children dying without issue. Accordingly provision is made for the share, the trusts of which have failed, going over to one or both of the remaining children and their issue. It is a referential trust. There is no further hotchpot clause.

The point which is raised is this: Whether when the referential trust has come into operation the property which goes over is subject to the original hotchpot clause applicable to the first property, or whether there is a new hotchpot clause to be inserted by reference applicable only to the share that does so go over.

The events that have happened here, so far as material, are these. Two thirds of a very large sum of money—in fact it was two thirds of the residue—were appointed by James Marke Wood the younger to his daughter to the exclusion of his son. Then the testator's younger son William Palgrave Wood died in 1911, intestate and without issue. In that event the referential trusts came into operation, and the son of James Marke Wood the younger, or his representatives,—I will call him the son—says, "As my sister got a much larger share of my father's settled property by virtue of the appointment, she ought not to take any part of William's share which comes over without treating it as all subject to the hotchpot clause which was applicable to the trusts of the original settlement upon James Marke Wood the younger." On the other hand it is said that there is in this will a gift of William's share. In the events which have happened that share is to be held upon the like trusts as are declared of the elder brother's share, that is to say, those trusts must be written in together with the power of appointment and

a hotchpot clause applicable to the share which so goes over, and as there has been no appointment of that share the son and the daughter will take the share equally. That is the point really between the parties, subject to one matter which I will not forget.

Counsel for the appellant has contended that the object of a hotchpot clause is, when you look at the scheme of a will of this kind, to secure equality between the grandchildren, and that there is a sort of presumption applicable to this case analogous to that which was laid down by Lord Cranworth in *Hindle* v. *Taylor* (1), which, so far as I am aware, has never been questioned, and has been certainly approved ever since. I am unable to accept that view. In my opinion there is no law and no presumption applicable to a case of this kind. It depends, in my opinion, upon the true meaning and effect of the will as a whole. It may be that that does not differ much from what has been called the scheme of the will, but I think it does differ a little from it. The contention based on the scheme of the will really seeks to raise that presumption or rule of law which I cannot find and which I do not think exists in a case of this kind.

What do we find here? We find in this will that there certainly are several distinct settlements with different beneficiaries, with different trusts, and different persons entitled on failure of issue of all of them taking the respective settled funds, and it appears to me they must be regarded as independent trusts. I suggested during the argument what I thought then, and think now, is not an unfair test. Could not separate trustees have been appointed in respect of each of these funds? I think they clearly could, and counsel for the appellant quite admitted that could be so, at least before there was any grandchild who attained twenty-one or attained a vested interest. If separate trustees might have been appointed of these funds there would be no coalescence; one could not be deemed to be an accretion to the other. If separate trustees had been appointed I know of no process of law by which the one set of trustees could be required to hand over the funds to another set, although the beneficiaries might be the same. It seems to me to be exactly like the case where you have a will and a settlement, or, if you like, two

(1) 5 D. M. & G. 577.

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settlements with similar trusts. Can it make any difference that in one particular event at a future date the beneficiaries happen to be the same? In my opinion it cannot. They are still separate trusts although under those trusts in one event, which may or may not happen, the beneficiaries may be the same. I am unable to find on this will any such scheme or any such rule of law or any such presumption as will justify me in saying that the fund, one half of William's one third which went over on his death without issue, is to be treated as a mere accretion to the elder son's share in the sense that all the original powers and provisions, including the hotchpot clause set out in the will with reference to that share, would apply not merely to the original fund, but to the accretion. Let me repeat an illustration which I suggested in argument. A very common form of will is a devise of freeholds to trustees upon trust to sell and to hold the proceeds of sale upon settlement trusts. You do not include copyholds because you want to save the expense of admission, and so on; you have separate clauses and a direction to sell the copyholds and to hold the proceeds upon the trusts thereinbefore declared with reference to the proceeds of sale of the freeholds. I should have thought there, unless there were some express words in the will, that that would be an accretion and the hotchpot clause and everything else would be applicable; but if there is any difference in the trusts at any stage, speaking for myself, I am not prepared to hold that the doctrine of accretion can apply. Therefore, on this point, which was the only point raised before Neville J., I think the view he took was right, and that there is nothing to justify the contention which has been put before us by counsel for the appellant that this is to be regarded as an accretion, it being true that there are separate trusts with a separate hotchpot clause inserted by reference, applicable, and only applicable, to this particular share that so went over.

Then another point has been taken that under the express clause in the will the hotchpot clause covers the case. Now, difficulties of this nature were well understood by conveyancers before the date of this will. Our attention has been called to Davidson's Precedents, where the author points out this difficulty. He treats it as a possible but not a quite certain result and he

gives a form to remove all possibility of doubt, and there is no difficulty whatever, and has not been for the last forty years, in inserting a proper form to meet the event which has happened. The only question is whether this particular hotchpot clause covers that case. We are dealing here with the residue. Under the trusts of the residue the trustees are to stand possessed of what are called the said residuary trust moneys and the investments for the time being represented and thereinafter called the residuary trust funds. The first trusts are of two thirds thereof, that is of the residuary trust fund, to James Marke Wood the elder during his life with power of appointment, and so on, and then again to the children in default of appointment. Then there is this hotchpot clause which I will read in full, "But so nevertheless that no child who or whose issue shall take a share under any such appointment as aforesaid" (that plainly is only an appointment of the two thirds) "shall (in default of appointment to the contrary) take any part" (not of the residuary trust fund) "of the trust funds remaining unappointed without bringing the share appointed to him or her or to his or her issue into hotchpot and accounting for the same accordingly." In my opinion there is nothing to justify the contention, as a matter of construction, that the hotchpot clause has any reference whatever except to that over which under the prior trusts there would be and had been an appointment—there is nothing to justify the suggestion that this hotchpot clause is intended to have the far-reaching effect of including not merely the two thirds but the one third which is settled subsequently. In my opinion this point does not avail the present appellant. I think the decision appealed from is correct and that this appeal must be dismissed.

KENNEDY L.J. I am of the same opinion. Neville J. in the judgment under appeal has refused to accept the view that the testator, James Marke Wood, intended that the hotchpot clauses should be amalgamated and that no child should take a share in any of the funds which are dealt with by the will without bringing into hotchpot any share which might have been appointed under another of his devises. I do not think myself as the result of the arguments which we have heard

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and the series of cases which have been brought before our notice that I could express the result of my opinion in simpler terms than those used by Neville J. himself in this case (1), where he says: "In the absence of anything to indicate an intention to the contrary, the referential declaration of trusts, in terms the same as, or similar to, the terms used here, do in effect mean no other than this: you are to reiterate the trusts already declared with reference to another fund in another part of the instrument, making only those necessary alterations as to names which would make the trusts applicable to the gift which is under consideration." I cannot find anything in this will to indicate an intention to the contrary; and there is nothing that I can add upon this point which has just been dealt with very fully and clearly by the Master of the Rolls.

SWINFEN EADY L.J. I also agree. It has been argued that the hotchpot clause contained in the will referring to a part of the residuary trust fund in terms embraces and covers the present fund, and that this direction immediately following the power of appointment as regards the two thirds sweeps up and embraces the particular fund in question as if it were to be treated as an express hotchpot clause embracing the present fund. I think it is clear that the trusts there declared are not of the residuary trust fund and that the hotchpot clause does not in terms refer to the residuary trust fund, but only to the two-thirds part thereof, of which the trusts were then being declared; that the trusts were declared of the two-thirds part, and then there was a power of appointment; then a fund going in default of appointment, and then a declaration that no child who should take a share under any such appointment as aforesaid, that is obviously an appointment in respect of the two thirds of the residue, should, in default of appointment to the contrary, take any part of the trust funds remaining unappointed. Again those are the trust funds that are being dealt with and embraced within the clause as to the two thirds. So that I approach the will in this way. It is a case in which there is no express direction contained in the will embracing this particular

(1) [1913] 1 Ch. 311.

fund, the trusts of this fund are declared by reference to those of the previous fund, and the referential words are that in the events that have happened and subject to an interest that is now determined, then as respects one moiety of the one third, the fund in question is to be "upon the like trusts for the benefit of my said son James Marke Wood during his life and of his wife and issue after his decease as are hereinbefore declared of and concerning the said other two third parts or shares"; in other words it is a disposition of this fund by means of a trust referential to what has gone before. Construing the will as one in which there is no express direction that for the purpose of hotchpot the two funds are to be treated as one fund, the question remains whether they should be aggregated for the purpose of hotchpot. For many years conveyancers have been in the habit of inserting an express provision to indicate the intention when the funds are to be amalgamated for that purpose, and in the various books of precedents for many years past forms for that purpose are to be found. In my opinion the whole law on the question of construction is really summed up by Parker J. in a few words in the case of *In re Cavendish.*(1) He points out that "Conveyancers have long been aware of the point and have been in the habit of inserting a provision to indicate the intention. In the absence of such an express provision the question is left open to be determined on the construction of the document as a whole." I think that really sums up the whole law.

Taking this will as a whole and having regard to the terms of the various trusts, I am satisfied that the true construction of the will requires that the funds should be kept separate, and that the moiety of one third of the residue ought to be dealt with as if it were a separate fund with a separate hotchpot clause, and accordingly that the Contessa is entitled to one half share of the unappointed moiety of the third share of residue, without bringing into hotchpot the two third shares appointed to her by her father's will.

Solicitors: *Paines, Blyth & Huxtable*; *Sharpe, Pritchard & Co., for Alsop, Stevens, Crooks & Co., Liverpool*; *T. F. Adshead.*

(1) [1912] 1 Ch. 802.

G. A. S.

NEVILLE J. 1913 July 4, 11.

In re TILT COVE COPPER COMPANY, LIMITED.

TRUSTEES, EXECUTORS, AND SECURITIES INSURANCE CORPORATION, LIMITED *v.* THE COMPANY.

[1913 T. 886.]

Company—Debenture-holders—Reserve Fund—Proposed Distribution amongst Shareholders—No Default under Debentures—Jeopardy—Receiver.

In 1888 a company under the powers of its memorandum and articles of association acquired certain mines, and created a debenture issue of 80,000*l.* which was a floating charge in common form protected by the usual trust deed. In 1912 the mines were worked out; the land, plant, and machinery at the mines were worthless; the company's issued share capital was exhausted; and practically its only asset was a reserve fund of 10,000*l.*, representing accumulated profits, which the company proposed to distribute amongst its shareholders.

The debenture interest had been regularly paid, and no event had happened which either under the provisions of the debentures or of the trust deed entitled the debenture-holders to enforce their security:—

Held, that the case came within the principle of jeopardy, and that the debenture-holders were entitled to have a receiver appointed.

In re New York Taxicab Co. [1913] 1 Ch. 1, distinguished.

MOTION.

This was an application in a debenture-holders' action for an injunction and the appointment of a receiver in these circumstances.

In 1888 the above-named company was formed under the Companies Acts to purchase and work copper mines at Tilt Cove, on the coast of Newfoundland. The original capital of the company was 160,000*l.*, subsequently increased to 200,000*l.*, divided into shares of 2*l.* each, of which 89,000 shares had been issued and were fully paid.

In November, 1888, the company made a debenture issue of 80,000*l.* in 800 debentures of 100*l.* each secured by the usual trust deed. The whole of the debentures were issued to the vendors or their nominees as part of the purchase price for the property sold to the company. The debentures were in common form and were a floating charge on all the property of the company, and the principal moneys thereby secured became payable

if default was made in payment of any interest or an order was made or an effective resolution was passed for winding up the company. By the trust deed the whole of the property, assets, and undertaking of the company were conveyed to trustees upon trust to permit the company and its assigns to hold and enjoy the premises and to carry on thereon and therewith the business authorized by the memorandum of association of the company until (inter alia) default should be made in payment of some principal moneys or interest secured by the debentures, or until an order of some Court of competent jurisdiction should be made, or until a breach of some covenant by the company thereinafter contained should have been committed. And the company thereby covenanted (amongst other things) that the company would during the continuance of the security carry on and conduct the business of the company to the greatest possible advantage; and it was thereby provided that notwithstanding anything therein contained the company, until a receiver should have been appointed of the mortgaged premises or until possession thereof should be taken under the provisions thereinbefore contained, should have full right and power in the course of its business and for the purpose of carrying on the same to sell, lease, exchange, mortgage, pledge or otherwise deal with its property for the time being as might be expedient (save that it should not be at liberty to sell, lease, or exchange the freehold or leasehold hereditaments described in the schedule thereto or any part thereof or to create any mortgage or charge over the same or any part thereof in priority to or ranking pari passu with the now stating deed or the debentures thereby secured or such of them as might from time to time be unredeemed), and also from time to time to make calls on all shares that should from time to time have been issued by the company in respect of the capital for the time being uncalled upon the shares of the company for the time being issued, and to give valid and effectual receipts for the amount of such calls and to use the moneys so received.

By an indenture of lease dated May 28, 1890, and made between the defendant company of the one part and the Cape Copper Company, Limited (hereafter called "the lessee company"), of the other part, the defendant company demised to the lessee

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company the whole of their properties, mining plant, machinery and effects, subject nevertheless to the said debenture trust deed and to the prior rights of the debenture-holders thereunder, from June 1, 1890, for the term of ninety-nine years at the yearly rent of 4400*l.* per annum. This lease contained a power for the lessee company at any time to determine the lease by notice in writing to the lessors after the expiration of twelve calendar months from the time of such notice. By a subsequent deed between the defendant company and the lessee company it was agreed that, instead of the rent of 4400*l.* reserved by the lease being paid, the annual net profit to arise from the working of the mines should be divided between the two companies in equal moieties, and this arrangement was carried out.

By another deed dated June 21, 1899, and made between the defendant company of the one part and the lessee company of the other part, it was provided (inter alia) that for the purpose of meeting any future losses that might be made in working the mines a reserve fund should be formed by setting aside out of the profits to arise from the working of the mines certain sums of money, until the total amount at the credit of such reserve fund should amount to 20,000*l.*, and that the amounts so set aside should be invested and held for the joint account of the two companies. In 1902 this reserve fund on the joint account of the two companies amounted to the sum of 20,064*l.* 11*s.* 1*d.* in Consols, and subsequently one moiety thereof was transferred to the defendant company and was represented by the sum of 10,032*l.* 5*s.* 6*d.* Consols.

On September 13, 1912, the defendant company issued a circular to its shareholders stating that a report had lately been made by an experienced mining engineer on the position and prospects of the company's mines, and that owing to its adverse nature the lessee company had given notice to terminate their lease on August 31, 1913. This report stated (as the fact was) that the whole of the copper deposits on the properties of the defendant company had been worked out. On June 5, 1913, the defendant company gave notice that at the ordinary general meeting of the company to be held on July 1, 1913, for the purpose of receiving the report and accounts for the year ending

December 31, 1912, sanction would be asked for the distribution of the reserve fund amongst the shareholders. Thereupon the plaintiff corporation, who held 500*l.* of the defendant company's debentures, at once issued a writ on behalf of itself and all other holders of debentures of the defendant company to restrain the defendant company from applying the said reserve fund in any way other than in redemption of the debentures secured by the trust deed, and consequential relief, and now moved for an interim injunction and for a receiver.

There was evidence that the properties of the company were now worthless, that no part of the plant and machinery at the mines was worth removing, that the company possessed no assets other than the said reserve fund of 10,032*l.* 5*s.* 6*d.* Consols and a sum of about 2240*l.* cash, and that in consequence thereof the company would have to cease to carry on business and would no longer be a going concern. It also appeared that the debenture interest had been regularly paid up to date, and no event had occurred which either under the provisions of the debentures or of the trust deed entitled the debenture-holders to enforce their security. But for the purposes of the case it was admitted that the company had not assets sufficient to meet the total liability under the debentures.

The action was a friendly one, the parties being desirous to have their rights determined by the Court, but the defendant company resisted the motion. It was agreed that the motion should be treated as the trial of the action.

Jenkins, K.C., and *C. A. Kirby*, for the plaintiffs. It may be that as between themselves and the shareholders the company can distribute this reserve fund although they have lost all their capital, but as regards the debenture-holders they ought not to do so because under the circumstances they will be doing something not authorized by their contract under the trust deed. They will be committing a breach of their covenants. They must use their assets to carry on the business, but they are admittedly insolvent and have a worked out mine, and if they distribute the reserve fund they will not be carrying on the business to the best advantage, but will make themselves still more insolvent

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and have no assets. The company may rely on *In re New York Taxicab Co.* (1), but it is distinguishable. There the company was a going concern, its assets were safe, and the security was not in jeopardy. Here, if this distribution is made, the company will be unable to carry on business and the security of the debenture-holders will not merely be depreciated but will be practically worthless. It is a clear case of jeopardy.

Peterson, K.C., and *Borthwick*, for the company. It is said that the company threaten and intend to commit a breach of their covenant.

[NEVILLE J. I am not satisfied that what is proposed to be done will be a breach of any of the provisions of the trust deed, but what I want you to direct your attention to is the general principle of jeopardy.]

Then the real question is, is this a case of jeopardy? In other words, does it come within *In re New York Taxicab Co.* (1), or is it something beyond it? Now this reserve fund represents profits which are divisible amongst the shareholders, and a company may distribute its profits until its debentures have crystallized. The argument for the plaintiffs comes to this, that if at any time the assets are insufficient to pay the debenture-holders they can intervene and prevent the distribution of profits amongst the shareholders by the appointment of a receiver. But no case of jeopardy has gone so far where the debentures are not enforceable.

G. M. Simmonds, for the trustees.

NEVILLE J. The question that arises in this case is a novel one, and it has to do with that fruitful source of litigation, the floating debenture, which is now well settled as part of the commercial procedure of this country. The case is this. These debentures, which include a floating charge over the company's property, are protected by a trust deed, and in the trust deed the security is made enforceable upon the happening of certain events and upon the breach of certain covenants. In the meantime the company are given the power of carrying on their business in the usual way,

(1) [1913] 1 Ch. 1.

and of disposing of their assets for the purpose of carrying on their business, and I cannot myself see that the precise words of the trust deed refer to the event which has happened. The event which has happened is this. The company in question was a mining company, owning a mine in Newfoundland, for which they paid 220,000*l.*, of which 80,000*l.* in cash was raised by an issue of debentures. Subsequently this company leased their property to another company, and the lessee company worked the mines and divided the profits between itself and its lessor. Things continued on this footing for a considerable length of time, until, unfortunately, the mines were discovered to be worked out, and the lessees, having a power of determining their lease, gave notice to determine it on August 31 in this year. At this time the principal asset of the company is a sum which we will call a sum of 10,000*l.*, although it may be less, which formed part of a joint reserve fund created by the two companies out of their profits, the half of which had been transferred to this company, possibly subject to some deductions which are not material for the purposes of my judgment. The business of the company is at an end, or will be at an end on August 31. The working of the mines, if it has not already ceased, will, at all events, then cease. There is no suggestion that the company can or will direct, or has any intention of directing, its energies to any further undertakings, but what it says is this: "We have got a fund of, say, 10,000*l.*, which represents accumulated profits, and we propose to divide this fund amongst our shareholders." That fund is a fund over which the mortgagees have a lien, and the question is whether it is in accordance with the principles which govern the exercise of the jurisdiction of this Court that the mortgagors should be entitled to divide this fund amongst them, leaving the mortgagees in a position in which the loss of their advances is practically certain, because, looking at the balance-sheet, it is clear that, beyond a few thousand pounds, the whole of the assets of the mortgagor company have ceased to be of value; the whole of the issued share capital has gone, and a large item of 42,050*l.* for plant and machinery has gone. I ought to have said that the company assigned its plant and machinery to the lessee company, and it is now practically

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of little or no value and will belong to the lessee company on the determination of the lease.

Now the question which I have to consider is whether, under those circumstances, the position of the mortgagees is in such jeopardy that, according to the well-known practice of the Court in such cases, the Court will appoint a receiver. Appointing a receiver, of course, in the case of a floating security, means enabling the mortgagees to enforce their security. Is that the right thing to do under the circumstances, holding, as I do, that the precise event is not covered by the words used in the trust deed, and that, if the plaintiffs succeed at all, it must be on the general ground of the jeopardy of the security of the mortgagees who have advanced their money to the company? If I do not appoint a receiver, then the mortgagors can divide amongst themselves their principal asset over which the mortgagees have a lien, although under the express terms of the deed it is not immediately enforceable. Is it right that I should allow this to take place; or, having regard to what has occurred, the fact that the business is at an end, and that the mortgagees will never get more than the merest fraction of their security, is it right to appoint a receiver? In my opinion it is right. The mortgagors ought to come after the mortgagees, and as practically all that is left is this reserve fund which the mortgagors propose to distribute among themselves, I think a receiver should be appointed, although naturally the result of that will be that the debentures will become enforceable.

I have been referred to the case of *In re New York Taxicab Co.* (1), decided by Swinfen Eady J., as shewing that the course that I am taking is contrary to some principle that he has laid down. I do not think so at all. In that case the only ground that the mortgagees had for alleging jeopardy was that the company was not in a position to pay its debts, it was insolvent, but there was no evidence that any of the creditors were endeavouring to get hold of the assets of the company, and there was nothing to shew that, if the company continued to carry on its business as it was then doing, it might not before long again be prosperous and in a position

(1) [1913] 1 Ch. 1.

to pay all its debenture-holders as well as its other creditors It was not a case where the business of the company had come to an end, and consequently I think it has no application to the facts before me. I hold, therefore, that the mortgagees are entitled to the appointment of a receiver, and there will be the usual reference to chambers. The costs of all parties will be costs in the action.

Solicitors: *Slaughter & May; Blunt & Co.; Leadam & Co.*

H. L. F.

In re BEAVAN.

DAVIES, BANKS & CO. *v.* BEAVAN.

[1908 B. 1743.]

Administration—Insolvent Estate—Receiver—Executor Surety for Testator—Right of Indemnity—Right of Retainer.

An executor, who is surety for an unpaid debt of his testator, cannot exercise his right of retainer in respect of his liability as surety unless he pays the debt, and then only to the extent of the assets actually in his hands at the time he pays it. But an opportunity may be given him to pay the debt, if he has assets in his hands, in order that he may set up his right of retainer.

After the usual judgment in a creditors' action to administer the estate of a testator a receiver was appointed. The estate proved to be insolvent. One of the executors, who was surety for an unpaid debt of 3000*l.* of the testator's, claimed that his right to indemnity out of the estate created an equitable debt which entitled him to retain in respect of it certain legal assets which constituted the greater part of the outstanding personal estate of the testator:—

Held, that as the executor had not paid the debt for which he was surety, there was no debt in respect of which he could exercise his right of retainer. The claim was therefore disallowed.

The principle of *In re Orme* (1883) 50 L. T. 51, and *In re Harrison* (1886) 32 Ch. D. 395, applied.

In re Giles [1896] 1 Ch. 956, not followed.

ACTION.

This was an action for the administration of the real and personal estate of J. G. Beavan, who died in November, 1906,

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having by his will appointed his four sons, Samuel, Francis, Thomas, and Charles, his executors. Samuel, Francis, and Thomas proved the will, power being reserved to Charles to come in and prove, but he did not do so, nor did he renounce probate or disclaim the trusts of the will.

The testator was possessed of considerable real estate, which was heavily mortgaged. He also had some personal estate. During the last two years of his life he was of unsound mind and his affairs were managed by his son Samuel.

The plaintiffs, a firm of private bankers, claiming to be creditors of the testator, commenced the action on behalf of themselves and all other the creditors of the testator in April, 1908, against the four executors, and the usual judgment was pronounced on November 21, 1908. By an order made on July 4, 1908, the defendant Thomas Beavan was appointed interim receiver of the testator's estate, and by a subsequent order made in November, 1908, his receivership was continued.

The claim of the plaintiffs to rank as creditors in respect of moneys supplied by them during the last two years of the testator's life for the maintenance of his household was established in November, 1911 : see *In re Beavan.* (1)

The estate proved to be insolvent.

The Master by his certificate, made in answer to the accounts and inquiries directed by the judgment, certified that the debts of the testator (including a sum of 691*l.* 1*s.* 2*d.* due to the defendant Samuel Beavan and a sum of 85*l.* 4*s.* 8*d.* due to the defendant Thomas Beavan) amounted altogether to the sum of 2584*l.*, and had been allowed. He also certified that the defendant Samuel Beavan was entitled to be indemnified out of the testator's estate against payment of a sum of 3000*l.*, being the amount of a mortgage dated June 2, 1888, and made between the testator of the first part, the defendant Samuel Beavan of the second part, and Francis Hampden (the mortgagee) of the third part, on lands in Radnorshire of which the testator was tenant for life and the defendant Samuel Beavan was entitled in fee simple in remainder, and containing a joint covenant by the testator and the defendant Samuel Beavan with the

(1) [1912] 1 Ch. 196.

mortgagee for payment of the mortgage debt of 3000*l.* and interest; that this sum was raised exclusively for the benefit of the testator and paid to him, and the defendant Samuel Beavan was now liable to pay it; and that the defendant Samuel Beavan was also entitled to be indemnified against all interest and mortgagee's costs payable by virtue of such mortgage and to be repaid the interest already paid by him to the mortgagee since the death of the testator, amounting to 691*l.* 1*s.* 2*d.*, being the debt allowed to him as above stated. He further certified that the defendants Samuel and Thomas Beavan were entitled to exercise their right of retainer as executors rateably as between themselves in respect of their said debts, and that the defendant Samuel Beavan also claimed to retain against the moneys due to him or in respect of which he was entitled to be indemnified as above mentioned the following legal assets of the testator, namely:—

(1.) A sum of 441*l.* 11*s.* 5*d.*, being the balance due from the defendant executors on their personal estate account.

(2.) A sum of 81*l.* 16*s.* 11*d.*, apportioned rents in the hands of and retained by the defendant Samuel Beavan.

(3.) A sum of 10*l.* 10*s.* 8*d.*, being the proportion of the rents of certain real estate, also in the hands of and retained by the defendant Samuel Beavan.

(4.) A sum of 126*l.* due from the defendant Samuel Beavan, being estate duty paid by the testator on part of the entailed property of which he was tenant for life.

(5.) Certain silver plated articles and jewellery which were stored by the executors in their names at their bankers' and were subsequently handed over to and sold by the receiver in July, 1912, under an order of the Court, and the sum of 563*l.* 11*s.* 3*d.*, the net proceeds of the sale, was paid by him into Court.

(6.) Certain old coins similarly stored and unsold and of the estimated value of 6*l.* 10*s.*

(7.) The furniture and household effects which were in the testator's house at the time of his death. A small part of the furniture was sold by the receiver for 60*l.* 15*s.* 5*d.*, which sum he paid into Court. The greater part of the furniture was

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now in the possession of the testator's widow, who had set up a claim to it.

These seven items, together with a sum of 749*l.* 6*s.* 3*d.* Consols in Court, represented substantially the outstanding personal estate of the testator.

The action now came on for hearing on further consideration.

Peterson, K.C., and *F. Thompson*, for the plaintiffs. The main question is whether the defendant Samuel Beavan is entitled to exercise his right of retainer in respect of his liability as surety for the testator's mortgage debt of 3000*l.* No doubt he is entitled to be indemnified against it, but it is submitted that he has no right of retainer in respect of his right to indemnity until he has actually paid the 3000*l.* Until he pays he has no such debt as entitles him to retain assets, and then the right to retain only attaches to moneys actually in his hands or which have been in his hands, and cannot attach to moneys collected by the receiver: *In re Orme* (1); *In re Harrison* (2); *In re Mitchell.* (3) But the authorities are not all consistent. In *In re Giles* (4), which will be cited against us, Kekewich J. held that an executor-surety's right of indemnity created an equitable debt in respect of which he was entitled to exercise his right of retainer. *In re Allen* (5) may also be relied on, but there the executor was held on the facts to be a specialty creditor of the testator. The right of retainer does not make the executor a secured creditor—*Lee* v. *Nuttall* (6)—and it is an anomaly that ought not to be extended: *Trevor* v. *Hutchins.* (7)

Bramwell Davis, K.C., and *Lyttelton Chubb*, for the defendant Samuel Beavan. The rights of a surety are defined in *Ascherson* v. *Tredegar Dry Dock and Wharf Co.* (8) He is entitled to be indemnified out of the estate against the debt for which he is surety before he has paid anything himself, and this right creates an equitable debt in respect of which he may exercise the

(1) 50 L. T. 51.
(2) 32 Ch. D. 395.
(3) [1913] 1 Ch. 201.
(4) [1896] 1 Ch. 956.
(5) [1896] 2 Ch. 345.
(6) (1879) 12 Ch. D. 61.
(7) [1896] 1 Ch. 844, 849.
(8) [1909] 2 Ch. 401.

right of retainer: *Ferguson* v. *Gibson* (1); *In re Giles* (2); Williams on Executors, 10th ed. p. 793; Seton on Judgments, 6th ed. p. 1467. This was a debt existing at the death of the testator. There was no covenant by him with the surety to pay it, as in *In re Allen* (3), but it is submitted that the principle of that decision is in our favour. *In re Mitchell* (4) is not inconsistent with our contention. It was purely a question as to the construction to be placed on the expression "all debts" in a will. *Ferguson* v. *Gibson* (1) was not cited in *In re Harrison* (5) and is approved of in *In re Illidge.* (6) In the case of *In re Orme* (7) Kay J. gave the executor an opportunity to pay the debt in order that he might set up his right of retainer, and to that extent his decision conflicts with *In re Harrison.* (5) We ask for the same opportunity for the defendant Samuel Beavan. He is ready to pay the debt.

[NEVILLE J. Must not a surety pay before he can claim to be indemnified at law: *In re Richardson* (8)? Suppose you have a right to retain, what assets are there that you can retain?]

We claim a right to retain all the assets which have passed through our hands or have been paid into Court or which have been collected by us. They are mentioned in the Master's certificate. Payment into Court does not deprive an executor of his right of retainer: *Richmond* v. *White.* (9) If our claim is allowed, there is personalty to upwards of 1500*l.* in respect of which we can exercise the right of retainer.

Owen Thompson, for the defendants Francis and Charles Beavan, supported the plaintiffs' contention because, if the claim of the defendant Samuel Beavan were allowed, it would exhaust all the personalty available for payment of the costs of administration.

Maugham, for the receiver, the defendant Thomas Beavan.

Peterson, K.C., in reply. *In re Giles* (2) conflicts with *In re*

(1) (1872) L. R. 14 Eq. 379, 386.
(2) [1896] 1 Ch. 956.
(3) [1896] 2 Ch. 345.
(4) [1913] 1 Ch. 201.
(5) 32 Ch. D. 395.
(6) (1884) 27 Ch. D. 478, 482.
(7) 50 L. T. 51, 54.
(8) [1911] 2 K. B. 705, 712.
(9) (1879) 12 Ch. D. 361.

NEVILLE J. 1913 BEAVAN, *In re*, DAVIES, BANKS & Co. *v.* BEAVAN.

Orme (1) and *In re Harrison*. (2) There is no right of retainer after the appointment of a receiver: Williams on Executors, 10th ed. p. 796. In *Ferguson* v. *Gibson* (3) there was no receiver.

NEVILLE J. The point I have to decide is one of some difficulty, owing to the state of the authorities. I should have thought that nothing was clearer than that the right of an executor to retain was a purely legal right which has been recognized in equity so far as it existed in law and no further, and has never been extended to equitable claims, except so far as they were equitable rights which were recognized and acted upon by the Courts of law, claims to which in an action or proceeding at law effect would be given. If that were all I had to deal with I should feel no difficulty about the case, because the executor here had an equitable right against the testator, and has or may have an equitable right against his estate in respect of his suretyship, arising from the fact that he joined in a covenant to pay a mortgagee who was a creditor of the testator. Therefore he is a surety and not a principal debtor, and has certain rights over against the principal debtor.

I think the case of *In re Richardson* (4) shews quite clearly (see particularly the judgment of Fletcher Moulton L.J.) that the right to indemnity which the surety has against the principal debtor does not arise at law until the surety has discharged the debt. It is true that the surety has, in addition, certain equitable rights which he can enforce in a Court of Equity, but they are purely equitable and are not included in the equities or equitable rights which have been recognized by the Courts of law. As I said before, I understand the rule to be that a Court of Equity will not extend the right of retainer, but will simply recognize it where it exists. If that is so, then prima facie there can be no right of retainer in the present case with respect to this mortgage debt, because until payment, which has not taken place, there is no legal liability of the estate to the executor. But I have been referred to cases which, I confess, give rise to considerable difficulty. In the

(1) 50 L. T. 51.
(2) 32 Ch. D. 395.
(3) L. R. 14 Eq. 379.
(4) [1911] 2 K. B. 705, 712.

case of *In re Orme* (1) the question arose before Kay J., and he held, as I should have held, that there was no right of retainer until after the payment of the debt by the surety, but he gave an opportunity to the surety to pay off the debt with the view that, when he had done so, he might have the advantage of retainer out of the assets of the testator in his hands. I think I ought to follow that decision if it applies. I do not see that it is contrary to any principle of law or equity, and it seems not an unreasonable thing to allow. But in *In re Harrison* (2) Pearson J. decided that where there was a payment off by the surety of the debt of the principal debtor, the surety could only set up a right of retainer in respect of assets which he held at the time when the debt to him arose, and that, inasmuch as in that case he had parted with all the assets before he had discharged the debt, there was no right of retainer, and with great respect that seems to me to be perfectly good law. In my opinion until you have the conditions on which the right of retainer depends, that is, the money in the hands of the executor and the debt existing at the same time, so that the executor can be presumed to have paid his own debt, you do not get the right of retainer at all. Where there are no assets in the hands of the executor at the time the debt arises, I do not see what he is to exercise his right of retainer upon, and therefore I think that what was done by Kay J. in *In re Orme* (1) would have been of no advantage unless the executor there had assets in his hands at the time he had the opportunity of making the payment. So far the matter would be simple, and I do not think any difficulty is created by the judgment of Chitty J. in *In re Allen* (3), because in that case there was a covenant by the principal debtor with the surety to pay the debt on a certain day, and Chitty J., upon the authorities cited to him, held that that created an immediate right in the surety to recover the whole amount of the debt as soon as it became payable, and that being so, of course there was a right to prove upon the covenant against the estate for the whole of the debt. It therefore does not seem to me to militate against any rule which I have referred to in respect of

(1) 50 L. T. 51. (2) 32 Ch. D. 395.
(3) [1896] 2 Ch. 345.

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retainer. But then comes the case of *In re Giles* (1), before Kekewich J., which goes a very great deal further, because it gives relief to the executor by way of retainer in a case where no debt existed at all, but only an equitable right to indemnity against the principal debtor. I know of no authority, prior to *In re Giles* (1), in which it has ever been held that the equitable right to indemnity is the subject-matter of retainer by executors. I rather gather that Kekewich J. was actuated by an idea, which has been presented to me in argument, that in equity useless forms will not be insisted upon, and therefore, if you have a right, such as that exercised by Kay J., of giving the executor an opportunity of paying the debt before you allowed his right of retainer, it was unnecessary to go through the form, but that you might provide for immediate payment of the debt to the creditor and so give effect to the right of retainer which the executor claims. But it seems to me that that is a totally different thing from the right to which Kay J. gave effect, namely, a right of retainer in respect of a legal debt which arose upon the payment off of the creditor, whereas Kekewich J. was giving effect to an equitable right, in respect of which there never was any right of retainer at all, the right of retainer being a purely legal doctrine. Consequently I think that *In re Orme* (2) and *In re Giles* (1) are in direct conflict, one judgment holding that there must be payment, and the other judgment holding that there need not be payment, in order to entitle the executor who is a surety to retain. In addition to that there is the case of *Ferguson* v. *Gibson* (3), before Wickens V.-C., which no doubt presents a difficulty. In that case one might infer that the learned Vice-Chancellor thought that an executor who was a surety had a right of retainer against creditors in an equal degree. But it was merely an expression of opinion and was not necessary for the decision of the point before him.

Now the question is what ought I to do when the authorities appear to me to be at variance? I think I ought to give effect to what I believe to be the principle underlying the right of retainer, i.e., that the right of retainer cannot be supported

(1) [1896] 1 Ch. 956. (2) 50 L. T. 51.
(3) L. R. 14 Eq. 379.

except in a case where there is a legal debt, or something that would be recognized by a Court of law as proper subject-matter for retainer. It seems to me that until payment there is not a debt which has ever been treated as the subject-matter of retainer. Therefore I think that in the present case the executor has not at present a right of retainer in respect of his suretyship for 3000*l.* Then comes the question whether I ought to follow *In re Orme* (1) and give him the opportunity to pay in order that he may exercise his right of retainer. I think it would be futile to direct anything of the kind in the present case, because there can be no doubt that if the doctrine of *In re Harrison* (2) is to be applied—and I think it should be applied—the executor is only entitled to exercise his right of retainer in respect of assets actually in his hands at the time he makes the payment. But there are now no assets in his hands which are available to satisfy the right of retainer. It appears to me, therefore, that I must declare the executor has no right of retainer in respect of the debt of 3000*l.*, and I decline to give him the opportunity to pay it.

[It was then agreed that the defendants Samuel Beavan and Thomas Beavan were respectively entitled to exercise their right of retainer out of items 1 to 6 above mentioned and the sum of 60*l.* 15*s.* 5*d.* mentioned in item 7 on account of their respective debts of 691*l.* 1*s.* 2*d.* and 85*l.* 4*s.* 8*d.*, rateably.]

Solicitors for plaintiffs: *Field, Roscoe & Co., for E. P. & A. L. Careless, Llandrindod Wells.*

Solicitors for defendants: *Dixon, Weld & Co.; Chubb & Pettitt, for Andrews, Barrett & Wilkinson, Weymouth.*

(1) 50 L. T. 51. (2) 32 Ch. D. 395.

H. L. F.

NEVILLE J.
1913
July 22, 31.

In re LAW GUARANTEE TRUST AND ACCIDENT SOCIETY, LIMITED.

LIVERPOOL MORTGAGE INSURANCE COMPANY'S CASE.

[00422 of 1909.]

Insurance of Debentures—Re-insurance—Contract of Indemnity—Liquidation —Scheme of Arrangement—Limit of Liability of Re-insurer.

A contract by a company with the holders of debentures issued by another company to guarantee the payment of principal and interest, though it may be called a policy of insurance, is merely a contract of suretyship; and a contract to re-insure such a policy is merely a contract of indemnity. If therefore a company, which has in this way insured the payment of debentures and re-insured a proportion of the risk, goes into liquidation and adopts a scheme under which the debenture-holders will receive less than twenty shillings in the pound, the re-insurers are only liable to pay to the original insuring company the amount which it pays in the liquidation to the debenture-holders.

The Law Guarantee Trust and Accident Society, hereinafter called the society, was incorporated in 1888. In August, 1900, the society in the ordinary course of its business guaranteed the payment of the principal and interest of a series of 275 debentures of 100*l.* each, bearing interest at 4½ per cent., issued by Sands, Wilson & Co. (1900), Limited, a company carrying on business as woollen manufacturers. The guarantee was contained in an agreement printed at the end of each debenture and signed by one of the directors on behalf of the society and was in the following form:—

"The society guarantee to the registered holder of the above debenture the payment of the principal and interest, but not bonus, to become due under the said debenture in manner following, that is to say:—

"1. As to the interest. If and whenever the company makes default in the payment of any interest for more than thirty days, the society will pay such interest on demand.

"2. As to principal. If the company makes default in the payment of the principal moneys, or any part thereof, the society

will pay the amount thereof upon whichever of the days following shall first happen, viz.:—(*a*) on the 30th day of August, 1910, above mentioned or (*b*) on the day after the securities for the debenture holders of the series to which the above debenture belongs shall have been enforced and completely realised and distributed so far as regards the holder of the above debenture.

"3. At any time after the company shall have made default for more than fourteen days in the payment of any of the said principal moneys or interest the society may by notice in writing to the debenture holder call on him to transfer to the society the above debenture and all his rights thereunder, and the debenture holder shall be bound to comply with such demand on payment of the full amount of the principal moneys and interest then owing in respect of such debenture.

"4. If the company makes default for more than thirty days in payment of any principal moneys or interest secured by the above debenture, the debenture holder must give notice in writing of such default to the society as to interest, within six calendar months after the default, and as to principal within twelve calendar months after the default."

The society were also appointed trustees for the debenture-holders under a trust deed in the usual form.

The society effected with the Liverpool Mortgage Insurance Company (hereinafter called the company) a re-insurance of this guarantee to the extent of 5000*l.*, being two elevenths of their risk. The agreement to re-insure was entered into by correspondence before the issue of the debentures, but a policy was afterwards issued in the following form:—

"Premium	£25	0	0
"Single	109	16	7

"The Liverpool Mortgage Insurance Company, Limited (hereinafter called 'the guarantors') hereby guarantees the within named Law Guarantee and Trust Society, Limited (hereinafter called 'the society'), to the extent of 5000*l.* being two elevenths of the risk assured by and subject to the conditions of the within policy of debenture insurance, and also the like proportion of all costs and expenses incurred by the society with the consent of the guarantors in respect of any claim arising under the

NEVILLE J. 1913 LIVERPOOL MORTGAGE INSURANCE COMPANY'S CASE.

within policy or in relation to the enforcement with the like consent of the society's powers as transferees of the debentures so long as the annual premium of twenty-five pounds shall be paid on the thirtieth day of August in each year, or within thirty days hereafter. In witness whereof the guarantors have caused these presents to be signed by two directors and their secretary, this twenty-third day of March 1904."

Sands, Wilson & Co. made default in the payment of their debentures, and in September, 1907, the society entered into possession of the property of that firm in exercise of the powers contained in the trust deed. On December 13, 1909, an extraordinary resolution was passed for the voluntary winding up of the society, a supervision order was made on December 14, 1909, and on July 28, 1910, a scheme of arrangement was sanctioned by Neville J. under s. 120 of the Companies (Consolidation) Act, 1908. By this scheme the payment of all claims was postponed until 1918, but the payment of interest until that date upon claims proved and admitted was provided for, and it was further provided that on payment of a final dividend in the winding-up the holders of debentures guaranteed by the society should release the society from all claims. The clauses of the scheme which affected re-insurers are set out below. (1)

The company had elected to be bound by the scheme.

(1) "22. The liquidators to have power to enter into and carry into effect any compromise or arrangement with any of the creditors or with any committee of debenture holders (whether involving the payment of moneys under clause 2 hereof or not) with the consent of the creditors' committee of inspection or the sanction of the Court. The liquidators also have power with the like consent or sanction to advance moneys for any purpose which may appear to assist in or be conducive to the beneficial realisation of the society's assets.

"23. The liquidators to be at liberty to deal with all re-insurers of risks undertaken by the society by offering them an option (to be exercised within such reasonable time as the liquidators shall appoint) either to have their liabilities in respect of re-insurances estimated as if this scheme of arrangement had not become binding and the assured had proved for the contingent liabilities of the society pursuant to section 206 of the Companies (Consolidation) Act 1908 on or before the 31st December 1910 or to be bound by the scheme in all respects and accordingly to have their liabilities in respect of re-insurances ascertained on the footing of the claims of the assured made and allowed under this scheme being treated as the amount payable under the policies re-insured."

This summons was taken out in the society's liquidation by the liquidators for a declaration that payment in full by the society of liabilities or risks incurred on policies or guarantees was not a condition precedent to the liability of the company in re-insurances by them of the same risks, and that such liability was not limited by or proportional to the amount of the dividend paid or to be paid by the society to the persons entitled to such policies or guarantees; and that in respect of the risk undertaken by the society on a guarantee to the holders of debentures in Sands, Wilson & Co., reinsured by the company as to two elevenths of such risk, the company were or would become liable to pay to the liquidators of the society a sum calculated on the basis that the company were liable to pay to the liquidators the whole sum which the society would have paid to the debenture-holders after deducting the proceeds of the security if it had been solvent, but it included a share of the interest payable under the scheme. The case of Sands, Wilson & Co. was taken as a test case to decide the liability of the company upon other re-insurances, and also of other re-insurers of the society's guarantees.

Younger, K.C., and *F. H. Maugham*, for the liquidators. The contract is one of re-insurance. The guarantee is treated as an insurance both in the original contract between the society and the debenture-holders, and in that between the society and the company. The contract of insurance is not a mere contract of indemnity. It is a contract to pay a certain sum upon a certain event, in this case upon the default of Sands, Wilson & Co. It is only like a contract of indemnity in that the amount payable is limited by liability of the original insurer. But the measure of the liability of the re-insurer is the liability of the original insurer, not the amount he is ultimately able to pay. It cannot make any difference that he cannot pay 20*s.* in the pound. A contract of re-insurance is an independent contract of insurance between the original insurer and the re-insurer, and is governed by all the commercial rules relating to insurance. There is no contract between the re-insurer and the original insured.

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In re Eddystone Marine Insurance Co. (1) is a clear decision that the whole amount re-insured is recoverable though nothing has been paid by the re-insurer. That is a stronger case than the present one, for the policy of re-insurance contained the words "and to pay as may be paid thereon." In *Uzielli* v. *Boston Marine Insurance Co.* (2) it was held that re-insurers were liable to the limit fixed by their policy, and Brett M.R. explained a contract of re-insurance as being a contract of insurance. In *China Traders' Insurance Co.* v. *Royal Exchange Assurance Corporation* (3) it was held that the plaintiff in an action on a re-insurance policy was entitled to the same discovery which the practice allowed in an action on a policy of insurance.

Nelson v. *Empress Assurance Corporation* (4) decided that the third party procedure did not apply to bring in the underwriter of a policy of re-insurance in an action on a policy of insurance, on the ground that a contract of re-insurance was not one of indemnity. *Dane* v. *Mortgage Insurance Corporation* (5) is a very similar case to this, and shews that notwithstanding the word "guarantee" the contract between the society and Sands, Wilson & Co. can be treated as one of insurance, and, therefore, their contract with the company must be one of re-insurance. It also shews that the scheme of arrangement does not alter the contract.

Law Guarantee Trust and Accident Society v. *Munich Re-Insurance Co.* (6) clearly decides that the scheme of arrangement in this case does not put an end to the liability of the re-insurers, but the question of the amount for which they would be liable was not decided.

The rule laid down in the *Eddystone Case* (1) is treated as settled law in all the text-books (see Arnould on Marine Insurance, 8th ed. vol. i. s. 324, p. 422).

If the Court is against us on that point and holds the contract to be merely one of indemnity, the person indemnified has a right to claim against the indemnifier the full amount proved in

(1) [1892] 2 Ch. 423.
(2) (1884) 15 Q. B. D. 11, 16.
(3) [1898] 2 Q. B. 187.
(4) [1905] 2 K. B. 281.
(5) [1894] 1 Q. B. 54.
(6) [1912] 1 Ch. 138.

his bankruptcy, though nothing has been paid: *Cruse* v. *Paine* (1); *Wolmershausen* v. *Gullick*. (2)

In re Richardson (3) will probably be cited against us. It is hard to reconcile that decision with the others. But Cozens-Hardy M.R. said in that case that there was no contractual right of indemnity, but an equity arising out of the fact that the husband was trustee for his wife and was entitled to an indemnity from her. The case seems to have been decided on the ground that a trustee ought not to make a profit out of his trust.

P. O. Lawrence, K.C., and *T. J. C. Tomlin*, for the company. The scheme of arrangement has entirely changed the position of the parties. Instead of a right to be paid at once in full the creditors get a right to have interest at 3 per cent. until the end of 1918, and then to have the assets distributed pari passu. That is all the society can lose, and all against which the company can be made to indemnify them. Clause 23 of the scheme deals with re-insurers and gives them an option to have their rights ascertained under the scheme, and the company have exercised that option and are now only bound to indemnify the society against their liabilities under the scheme.

But apart from that, if we look at the original contract it is quite plain that it is a contract of suretyship. The debenture-holder is the principal creditor, Sands, Wilson & Co. the principal debtor, and the society the surety. It makes no difference that the parties chose to call it a policy. It is quite different from the cases on marine and fire insurance. Those forms of insurance are made contracts of indemnity by the policy of the law which forbids a profit being made on the loss of a ship or the burning of a house. A contract of life insurance is not a contract of indemnity. In this case the contract between the society and the company is one of mere indemnity and nothing else. The law is rightly laid down in *In re Richardson* (3), and that case entirely covers this. The judgment of Fletcher Moulton L.J. is quite clear.

In re Eddystone Marine Insurance Co. (4) is the only case in which the re-insured has been allowed to recover more than his

(1) (1869) L. R. 4 Ch. 441.
(2) [1893] 2 Ch. 514.
(3) [1911] 2 K. B. 705.
(4) [1892] 2 Ch. 423.

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loss, and in that case this point was not argued ; the only point argued was whether payment of the loss was a condition precedent to recovery. When that was decided the proof was admitted for the whole amount without argument.

A contract of marine insurance is an exception to the rule which governs contracts of indemnity. *Nelson* v. *Empress Assurance Corporation* (1) shews that it is not a mere contract of indemnity. But in this case the contract is one of mere indemnity.

Cruse v. *Paine* (2) does not help the liquidators, for they have made a bargain which relieves them of the liability they were indemnified against. The scheme is a compromise, and it is settled that a principal debtor who has compromised cannot claim from his surety more than the amount he has compromised for.

Younger, K.C., in reply.

Cur. adv. vult.

July 31. NEVILLE J. The Law Guarantee Trust and Accident Society, which I will call the society, guaranteed the debentures of Sands, Wilson & Co., and contracted with the Liverpool Mortgage Insurance Company, which I will refer to as the company, for a guarantee of part of the amount up to 5000*l.*, with a corresponding proportion, namely, two elevenths, of any costs incurred by the society in the realization of the debenture-holders' security under a mortgage deed of which the society was the trustee. The society being in liquidation under a scheme by which the company have agreed to be bound, the question the Court is asked to determine is the extent of the liability of the company under their contract with the society—whether they are liable to pay to the society, to be distributed among the general creditors of the society, the whole amount guaranteed by them if the company only pay a dividend to the debenture-holders, or whether their liability is limited to the actual amount paid by the society under the contract of the latter with the debenture-holders.

If the society ultimately pay their creditors 20*s.* in the pound the question will not arise, but if less than the full amount is

(1) [1905] 2 K. B. 281. (2) L. R. 4 Ch. 441.

paid by the society, an event which the liquidator anticipates, the question becomes of great importance. In that case, if the liquidator's contention is right, large sums will be payable under what are called re-insurances in excess of the dividends paid by the society in respect of their contracts with the debenture-holders. The contract upon which the liability, whatever it may be, of the company depends is with the society alone, and no one but the society can, directly at all events, enforce any claim under it. The question, of course, must depend upon what is the true construction of the contract itself, but in determining that question it is necessary to ascertain whether the contract is merely a contract of indemnity or whether it is in essence a re-insurance of the risk undertaken by the society, for it has been argued that in the latter case, although contracts of insurance and re-insurance are in a certain sense contracts of indemnity, the liability under such contracts is not identical with that under a mere contract for indemnity: see judgment of Mathew L.J. in the case of *Nelson* v. *Empress Assurance Corporation.* (1)

In the case of *In re Richardson* (2), in the Court of Appeal, the question of the liability under a contract of indemnity is fully considered. The effect of the decision in that case is very clearly, and I think correctly, stated in the head-note. There a trustee in bankruptcy who had not paid the debtor's liability under a lease in respect of which he was entitled to indemnity was held not entitled to recover under the indemnity for the benefit of the general creditors, but only for the benefit of the lessor; and an action by the lessor and the plaintiff on the indemnity for the amount of the liability was treated as an action to enforce the indemnity by payment, not to the trustee who was entitled to the indemnity, but to the lessor. The original contract of the society with the debenture-holder is a contract of suretyship on special terms. The society has insured no risk in the ordinary sense, but has undertaken with the creditor to pay him if the principal debtor does not. This is what is described in the company's contract as "the risk assured by the within policy of debenture assurance." Now the parties are entitled to call the contract by any name they please, but so calling it does not alter its essential

(1) [1905] 2 K. B. 281. (2) [1911] 2 K. B. 705.

NEVILLE J. 1913 LIVERPOOL MORTGAGE INSURANCE COMPANY'S CASE.

character, which appears to me to be that of suretyship, and the risk, two elevenths of which the company undertakes to pay, is the liability arising from the society's suretyship. The original contract not being a contract of insurance, the company's contract cannot well be a contract of re-insurance in the ordinary sense of the word. It appears to me to be more properly described as a contract of limited indemnity.

Now if it be a contract of indemnity, the effect of the decision of the Court of Appeal in *In re Richardson* (1) appears to be this, that the society cannot claim from the company on their own account more than they have paid, but that they can call upon the company within the limit of their bargain to pay off the debenture-holders, and, further, that if they were to recover the full amount they would hold it for the benefit of the debenture-holders, and not for the benefit of their general creditors. Two considerations arise in dealing with contracts of re-insurance, and the similar, but not, I think, completely analogous, contracts of indemnity in respect of a guarantee. Both I take it are in essence contracts of indemnity. The first consideration is this—that, if it be held that payment is a condition precedent to recovery, the contract may be of little value to the person to be indemnified, who may be unable to meet the claim in the first instance. The other consideration is that, if an action lies before payment, the party who contracted for indemnity may make a profit out of the transaction, which is contrary to the nature of the bargain. It appears to me that both these objections are satisfied if it be held that payment is not a condition precedent to the right of action, but that any amount recovered in excess of the amount required to indemnify must be held on behalf of the party contracting to give the indemnity. I believe that this has been held in the case of double or over insurance, where the insured is entitled to sue on all the policies, but holds any balance after satisfying his loss for the benefit of the insurers. In equity a way out of the difficulty has been found (as is shewn by *In re Richardson* (1)) by compelling the person who has given the indemnity to discharge the obligation direct.

(1) [1911] 2 K. B. 705.

In my opinion, if the society recover the whole of the amount guaranteed by the company they will hold it on behalf of the debenture-holders, and not for the benefit of their general creditors, the amount they can recover and retain on their own behalf being limited to the amount actually paid in discharge of their liability to the debenture-holders. It may be, having regard to the indorsement of the company's contract upon the debenture, that they may be compelled to recover the whole amount for the benefit of the debenture-holders, but this is not before me.

I hold that the beneficial interest of the society in the contract of the company is limited to two elevenths of the interest paid under the scheme and two elevenths of the ultimate dividend. I do not think that, under the terms of the scheme, the company's liability is affected in this respect.

Solicitors: *Sharpe, Pritchard & Co., for Alsop, Stevens, Crooks & Co., Liverpool; Frere, Cholmeley & Co.*

J. R. B.

PARKER J.
1912
May 21, 22.

In re SEATON.
ELLIS *v.* SEATON.

[1912 S. 714.]

Will—Construction—Gift of Income for her Life or until a certain Event—Gift over on that Event happening—Non-happening of Event—Determinable Life Interest.

A testator gave one fourth of his residue to trustees in trust to pay the income thereof to his daughter E. during her life or until she should receive the legacy of 20,000*l.* left to her under the will of D. (who was then dead), and then that "the one fourth share of my residuary estate and the income arising therefrom which I have bequeathed to her" should fall into residue and be divided between his three other children. E. survived the testator and died without receiving the legacy, which could never be paid owing to the insolvency of D.'s estate:—

Held, (1.) that the words of the gift over were not sufficient to enable the Court to imply an absolute gift in any event to E.; (2.) that E. took only a terminable life interest; and (3.) that on E.'s death the gift over took effect.

The principle of *Luxford* v. *Cheeke* (1684) 3 Lev. 125; *Browne* v. *Hammond* (1858) John. 210; *Etches* v. *Etches* (1856) 3 Drew. 441; and *In re Cane* (1890) 60 L. J. (Ch.) 36, applied.

Joseph Seaton by his will, dated May 2, 1885, appointed certain persons as executors and trustees thereof, and, after making certain bequests, devised and bequeathed his residuary real and personal estate unto his trustees, upon trust to sell and convert the same, and out of the proceeds of the sale and conversion to pay his funeral and testamentary expenses and legacies, and to invest the residue, and to stand possessed of the said trust moneys and the investments representing the same, as to one fourth part thereof in trust to pay the same to his son Ernest W. A. Seaton, as to one other fourth part to pay the same to his daughter Katherine J. Seaton, as to another fourth part to apply the income for the maintenance of his son Robert W. Seaton during his life and after his death for his children, "and as to the remaining one fourth part of the said residuary trust moneys in trust to pay the income thereof to my dear daughter Ellen Dickinson during her life, or until the happening of the event hereinafter mentioned." The will then continued: "Provided always and I hereby declare that whensoever my said daughter Ellen Dickinson shall receive the

legacy of 20,000*l.* left to her under the will of her late father-in-law Robert Dickinson, or such reasonable proportion as may maintain her in reasonable respectability, then that the one fourth share of my residuary estate and the income arising therefrom which I have bequeathed to her shall revert to, fall in and form part of my residuary estate and shall be equally divided between" the three other children, the share of Robert W. Seaton to be held upon the same trusts as his original one fourth share, "and in lieu of the said one fourth share so reverting from my said daughter Elizabeth Dickinson, I bequeath to her the sum of 50*l.* as a token of affection."

The testator died on September 13, 1886, and Ellen Dickinson died on November 16, 1911, having by her will appointed Harold Dickinson her executor. She never received any part of the 20,000*l.* legacy from Robert Dickinson, and the trustees of the testator's will were satisfied that her estate would never receive any part of it.

One of the trustees of the testator's will took out an originating summons against Ernest W. A. Seaton (as one of the residuary legatees and next of kin), one Haslett (the assignee of the interest of Ernest W. A. Seaton), Katherine J. Seaton and Robert W. Seaton (as residuary legatees and two of the next of kin), the three children of Robert W. Seaton, and Harold Dickinson (as executor of Ellen Dickinson and the other trustee of the testator's will) for the determination of the question whether upon the true construction of the testator's will and in the events which had happened the one fourth share of residue in which a determinable life interest was given to Ellen Dickinson was undisposed of by the testator's will; and if and so far as necessary for the execution of the trusts of the testator's will.

Austen-Cartmell, for the plaintiff, stated the facts and the questions involved.

J. M. Gover, for the executor of Ellen Dickinson. It will be contended, on the authority of *In re Mason* (1), that Ellen Dickinson did not take an absolute interest as there was no indefinite gift of income to her. But assuming that

(1) [1910] 1 Ch. 695.

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under the first words of the gift she took only a terminable life interest, subsequent words refer to "the one fourth share . . . . which I have bequeathed to her," and shew that in certain events she was to take the corpus. This expression of the testator's intention, although imperfect, is sufficient to raise the implication that Ellen Dickinson was to take the corpus if she did not receive the legacy of 20,000*l.* in her lifetime: *In re Martin.* (1) If Ellen did not take an absolute interest, there is an intestacy as to her share.

T. J. C. Tomlin, for the defendants Ernest W. A. Seaton and Haslett. The general rule is that where the ulterior estate is expressed to arise on a contingent determination of the preceding interest, and the prior gift does in event take effect, but is afterwards determined in a mode different from that which is so expressed by the testator, the ulterior gift fails: Jarman on Wills, 6th ed. p. 1361. But there is an exception to this rule where there is a devise to a woman during her life if she continues a widow and if she marries then over. If she dies without marrying again the gift over takes effect: *Luxford* v. *Cheeke.* (2) In such a case the testator when he refers to the marriage must be taken to describe the determination by any means of the estate durante viduitate: *Browne* v. *Hammond.* (3)

The general principle of the exceptions is not confined to gifts durante viduitate, but applies where the life estate of a widow or even a man is determinable on events other than those of death and marrying again, as, for instance, bankruptcy: *Etches* v. *Etches* (4); *In re Cane.* (5)

It is submitted that the present case falls within the principle laid down by the cases establishing these exceptions.

W. R. Sheldon, for other persons in the same interest, referred to Jarman on Wills, 6th ed. pp. 1363, 1364; Theobald on Wills, 7th ed. p. 577.

PARKER J. In this case the difficulty arises by reason of the happening of an event which was never contemplated by the

(1) (1885) 53 L. T. 34.
(2) 3 Lev. 125.
(3) John. 210.
(4) 3 Drew. 441.
(5) 60 L. J. (Ch.) 36.

testator. If he had contemplated that event, he would certainly have inserted some other provisions. I must, however, construe the will as it stands. The scheme of the will is a trust for conversion and a division of the proceeds of conversion into fourths. One son and one daughter take a fourth each absolutely; another fourth is settled, and the remaining fourth is the subject of the present summons. The testator gave that fourth in trust for his daughter Ellen Dickinson during her life or until the happening of the event thereinafter mentioned. That event was whensoever she should receive the legacy of 20,000*l.* left to her by her late father-in-law's will, or such reasonable proportion as would maintain her in reasonable respectability. On that event happening her fourth share was to revert to the testator's residuary estate and go as the other three original fourths had been directed to go. Then the testator proceeded to say that in that event, in lieu of the said fourth share, he bequeathed 50*l.* to his daughter Ellen as a token of his affection.

That gift was made in reference to the fact that Ellen's father-in-law had already died and that she was entitled under his will to a legacy which had not been paid. In the testator's mind there was no doubt that it would be paid, but in fact the father-in-law's estate turned out to be insolvent, and the legacy never will be paid.

Three alternative contentions have been put forward. The first of these is that Ellen took an absolute interest in one fourth share of the residue. This argument is based on the terms of the gift over which refers to the "one fourth share of my residuary estate and the income arising therefrom which I have bequeathed to her," and it is said that although he first gave Ellen only a terminable life interest, the words of the gift over are sufficient to enable me to infer that the testator intended her to take the corpus in a certain event, and that that event has happened. But I am unable to infer any intention in favour of an absolute gift in any event, as the words of the gift over may refer to the income only of this fourth share.

The second contention is that there is an intestacy, after the death of Ellen, as to this fourth share; but I am unable to take this view.

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The third contention is that the limitation over to the three other stocks does not take effect only in the event mentioned in the will, but also on Ellen's death, and this appears to me to be the correct view. One has to distinguish between (1.) a limitation for life or until the happening of a particular event, and (2.) an absolute gift for life with an executory limitation over. In the latter case one has to read the terms of the gift strictly because it is divesting something which has already vested; but it is different when one is dealing with a terminable life interest, as in that case no prior gift is divested.

This is obviously the case of a terminable life interest, and, whether there was or was not a gift over, that interest would come to an end on the happening of the event of Ellen's death. It is well settled that where there is a terminable life interest and there is a gift over on the happening of an event which does not take place, the Court will read this as a limitation in remainder on the life interest which has determined by death.

It has been pointed out that this principle is not confined to gifts to a widow determinable on her marrying again, but includes the case of a gift to a man determinable on bankruptcy or some other event. The most reasonable construction, in my opinion, is to adopt the principle of the cases by which this is established. Suppose in this case that Ellen, having survived the testator, had died without receiving the legacy, but that it had been paid to her executor immediately after her death. Obviously the testator's intention would be that the gift over should take effect. Suppose she died in the testator's lifetime without receiving the legacy and after her death it was paid to her executors. I think the testator would intend the gift over to take effect although the specified event had not happened. All these difficulties are got over by treating the case as governed by the principles of the cases applicable to terminable life interests.

I therefore decide that on the construction of this will Ellen's interest terminated with her death, and that the gift over then took effect.

Solicitors: *Patersons, Snow & Co.; Maude, Tunnicliffe & Co.*

F. E.

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In re ATTKINS.
LIFE *v.* ATTKINS.

[1913 A. 1749.]

Merger—Settled Estate—Tenancy for Life and Freehold Reversion—Executory Gift over—Conveyance of Life Estate—Intention—Merger at Law and in Equity.

Under the will of a testator, C. A., who died in February, 1889, a freehold farm stood limited to the use of the testator's widow for life with remainder to the use of her son C. B. A. in fee, with an executory gift over to G. A. in the event of the death, unmarried, of C. B. A. in the lifetime of the widow. By a deed of December 9, 1889, the widow, in consideration of 10*s.* and of natural love and affection, conveyed the farm unto and to the use of C. B. A. for all the remainder of her life. G. A. died in 1900, having by his will devised the farm to trustees upon trust for sale and division amongst his children. In 1902 the farm was sold and the money invested. C. B. A. died intestate and unmarried on July 22, 1912, and letters of administration to his estate were granted to his mother. She was still alive. Upon an originating summons by the surviving trustee of the will of C. A., for the purposes of the Settled Land Acts, to determine who was entitled to the capital moneys representing the proceeds of sale of the farm:—

Held, that there was a merger of the life interest of the widow in the freehold reversion by operation of law and also in equity, inasmuch as no presumption could be made of an intention on the part of the grantee to preserve the life estate; and therefore the capital moneys in question belonged to the trustees of the will of G. A.

ADJOURNED SUMMONS.

By his will, dated April 11, 1888, Charles Attkins, of Newhall Green, Baguley, in the county of Chester, farmer, appointed his wife, the defendant Elizabeth Attkins, and his son Charles Beresford Attkins to be the executors and trustees of his will, and after certain other bequests devised and bequeathed all his freehold estate at Baguley, consisting of a farmhouse and outbuildings and lands attached thereto, to his wife Elizabeth for her life, and at her death to his son Charles Beresford Attkins, but if his said son should die in his lifetime, or in the lifetime of his wife, unmarried, then to George Attkins, of Walsall, Staffordshire.

Charles Attkins died on February 11, 1889, and his will was proved by Elizabeth Attkins and Charles Beresford Attkins on

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May 13, 1889. George Attkins by his will made February 28, 1889, appointed the defendants Alfred John Cotterell and Francis Richard Parkes trustees and executors thereof, and devised and bequeathed to them all the real and personal estate of which he might be seised or possessed at the time of his decease upon trust to pay his wife an annuity of 200*l.*, and afterwards as therein directed, and after reciting that under the will of his cousin Charles Attkins he was entitled to certain freehold hereditaments at Baguley, in the event of Charles Beresford Attkins dying unmarried, he directed that in that event his trustees should stand possessed of the said hereditaments upon trust to sell the same and divide the proceeds equally amongst his children. By an indenture of conveyance dated December 9, 1889, Elizabeth Attkins, in consideration of 10*s.* and also of her natural love and affection for Charles Beresford Attkins, conveyed to the said C. B. Attkins all that messuage and tenement situate at Baguley in the occupation of Charles Attkins, and known as the Yew Tree Farm, and certain fields (being the said estate at Baguley devised by the will of Charles Attkins), to hold the same unto and to the use of C. B. Attkins for all the remainder of the life of Elizabeth Attkins. George Attkins died on January 16, 1900.

By an order made on November 29, 1901, by Buckley J. in the matter of the estate known as the Yew Tree Farm and the lands settled by the will of Charles Attkins, and in the matter of the Settled Land Acts, 1882 to 1890, the plaintiff, John Life, and J. O. Barrow (since deceased) were appointed trustees under the above-mentioned settlement for the purposes of the Settled Land Acts.

In 1902 Charles Beresford Attkins sold Yew Tree Farm under the powers of the Settled Land Acts, and the defendant Elizabeth Attkins concurred in the sale. The net proceeds of such sale amounted to 5260*l.* and now stood invested in the name of the plaintiff.

Charles Beresford Attkins died on July 22, 1912, intestate, and without having been married, and letters of administration of his estate were granted to Elizabeth Attkins on August 20, 1912.

Elizabeth Attkins was still alive, and the question arose whether the conveyance by her to her son C. B. Attkins of her life estate

by the deed of December 9, 1889, created a merger, and thereby the beneficiaries under the will of George Attkins came into immediate possession of the estate, or whether the life estate continued still to exist and went to the administratrix of C. B. Attkins.

The plaintiff, John Life, as surviving trustee for the purposes of the Settled Land Acts of the will of Charles Attkins, took out an originating summons on June 17, 1913, to have the question determined as to who were the persons now entitled to the proceeds of sale of the settled estate. Elizabeth Attkins and the trustees of the will of George Attkins were made respondents to the summons.

Thomas Clarkson, for the plaintiff, stated the facts and referred to the cases of *Snow* v. *Boycott* (1) and *Thellusson* v. *Liddard*. (2)

E. W. Bather, for Elizabeth Attkins, the legal personal representative of C. B. Attkins. The life estate of his mother purchased by C. B. Attkins still continues, and there has been no merger of that estate at law or in equity. The executory gift over of the fee took effect before there was a determination of the life estate.

T. J. C. Tomlin, for the trustees of the will of George Attkins. There has been a merger of the life estate in the freehold reversion both at law and in equity. To prevent merger there must be something in the deed under which the two estates came together, or else in the surrounding circumstances, to indicate an intention to preserve the life estate. In the present case there were no such circumstances, and no intention to preserve the life estate can be presumed: *Manks* v. *Whiteley*. (3)

[EVE J. referred to *In re Radcliffe*. (4)]

There appears to be no authority precisely in point. It is a question of intention: *Chambers* v. *Kingham*. (5)

E. W. Bather in reply, referred to *Ingle* v. *Vaughan Jenkins* (6); *Capital and Counties Bank* v. *Rhodes*. (7)

Cur. adv. vult.

(1) [1892] 3 Ch. 110.
(2) [1900] 2 Ch. 635.
(3) [1912] 1 Ch. 735, 767.
(4) [1892] 1 Ch. 227.
(5) (1878) 10 Ch. D. 743.
(6) [1900] 2 Ch. 368.
(7) [1903] 1 Ch. 631.

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July 26. EVE J. At the date of the conveyance hereinafter mentioned Yew Tree Farm stood limited under the will of the late Charles Attkins to the use of his widow, Elizabeth Attkins, for life with remainder to the use of her son Charles Beresford Attkins in fee, with an executory gift over to George Attkins in the event of the death unmarried of the said Charles Beresford Attkins in the lifetime of the said Elizabeth Attkins. By an indenture dated December 9, 1889, Elizabeth Attkins, in consideration of the sum of 10*s.* and of her natural love and affection for her son Charles Beresford Attkins, conveyed Yew Tree Farm unto and to the use of her said son for all the remainder of her life. Charles Beresford Attkins died unmarried on July 22, 1912. Elizabeth Attkins is still alive, and the question I have to decide is whether her life interest merged in the freehold reversion now vested in the persons claiming under George Attkins—who is also dead—or whether, there being no merger, the life interest belongs to the legal personal representative of Charles Beresford Attkins.

On the execution of the deed of December 9, 1889, there was in my opinion a merger at law. It was argued that, inasmuch as the executory gift over of the fee took effect before the determination of the life interest, there could not in fact be any merger, but I do not think there is any substance in that contention. If it were sound it would involve this proposition, that in all cases where the freehold reversion is subject to an executory gift over the question whether or not a conveyance of the life interest to the reversioner effects a merger at law must remain an open question until it has been ascertained whether (if the executory gift over takes effect at all) it takes effect before or after the life interest has determined. I do not think there is any authority to support such a proposition. There being, therefore, a merger at law, the only question that remains is whether there is a merger in equity.

There is nothing in the form of the transaction to indicate any intention to avoid this result, nor, in my opinion, are there any circumstances attending the transaction from which I ought to presume such an intention.

The grantee must be taken to have known that the contingency of his death in the lifetime of the tenant for life was a

possible if a remote contingency, and as he has elected, with this knowledge, to complete the transaction without adopting any expedient to prevent merger and without any declaration of an intention to preserve the life estate, I think I should be quite wrong in raising a presumption that he had any intention other than that evidenced by his conduct.

Accordingly, I hold that there was a merger by operation of law and in equity and that the contention of the respondents the trustees of the will of George Attkins must prevail.

Solicitors: *Preston & Smith, Manchester; Grundy, Kershaw, Samson & Co., for Howard Cant & Cheatle, Birmingham.*

G. M.

In re VISCOUNTESS TORRINGTON.

Revenue—Estate Duty—Exemption—Settled Property—Marriage Settlement—Covenant to settle After-acquired Property—Probate Duty—"Personal property settled by a disposition"—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 21, *sub-s.* 1.

The payment of probate duty in respect of personal property bequeathed by a testator dying before the coming into operation of the Finance Act, 1894, to a legatee already bound by a covenant in his marriage settlement to settle such property, does not exempt the property from liability to pay estate duty under the settlement, such a case not falling within the terms of s. 21, sub-s. 1, of the Finance Act, 1894.

PETITION.

The petitioners, Henry Sydney Seymour and Sidney Alexander Cheale, claimed to be persons aggrieved within the meaning of s. 10, sub-s. 1, of the Finance Act, 1894. They were the surviving trustees of a marriage settlement dated January 24, 1885, and made on the marriage of the eighth Viscount Torrington with Emmeline St. Maur Seymour, whereby certain freehold hereditaments, to which the eighth Viscount was entitled in fee simple subject to a mortgage and certain family charges, were conveyed to the trustees of the settlement to the use of the eighth Viscount and his assigns during his life, and after his death to the use that Emmeline, Viscountess Torrington

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might thenceforth receive during her life, so long as she should remain the widow of the eighth Viscount, a jointure rent-charge of 800*l.* per annum to be charged upon all the said premises, and, subject and charged as aforesaid, to the use of the first and every other son of the eighth Viscount in tail male. The settlement contained, inter alia, two covenants as to settling future property—(1.) a covenant by the eighth Viscount to convey and assign to the settlement trustees so much of any property, legacy, interest, or benefit which he, the eighth Viscount, might thereafter absolutely become entitled to under the will of his aunt, Mary Anne, Dowager Viscountess Torrington, as should be equal in value to the sum of 5000*l.*, if the said property should exceed in value the sum of 5000*l.*, but if not, then the whole of such property, interest, or benefit; (2.) a further covenant by the eighth Viscount in similar terms to convey and assign to the settlement trustees any property to which he might be absolutely entitled under the will of Andalusia Grant, Dowager Lady Molesworth, as should be equal in value to the sum of 20,000*l.*, if the said property should exceed in value that sum, but if not, then the whole of such property. No personal property was actually comprised in the settlement.

Under the trusts of the settlement all personal property to become subject to the trusts thereof under these covenants was settled upon trust for the eighth Viscount during his life, and after his death upon trust for Emmeline, Viscountess Torrington during her life, with remainder, in the events which happened, to the only child of the marriage, the ninth Viscount.

Mary Anne, Dowager Viscountess Torrington died on January 26, 1885, having by her last will made certain bequests in favour of the eighth Viscount, which became subject to the trusts of the marriage settlement by virtue of the first covenant. The total amount received by the trustees of the marriage settlement from the executors of this testatrix was 4376*l.* 5*s.*, which was duly invested in accordance with the provisions of the settlement.

The Dowager Lady Molesworth, who died on May 16, 1888, by her will bequeathed an interest in her residuary estate which amounted to 13,630*l.* 17*s.* 11*d.*, and this was received by the

settlement trustees by virtue of the second covenant and invested. Notice of the marriage settlement was given to the executors of the two wills, and probate duty was duly paid in respect of both these sums.

The eighth Viscount died on October 20, 1889, and Emmeline, Viscountess Torrington on June 7, 1912. The one child of the marriage, the present ninth Viscount, had attained twenty-one and became entitled to the settled property. The property passing or deemed to pass on the death of Emmeline, Viscountess Torrington included the investments representing these two sums of 4376*l.* 5*s.* and 13,630*l.* 17*s.* 11*d.* respectively.

The Commissioners of Inland Revenue claimed estate duty on these two sums upon the death of Emmeline, Viscountess Torrington, and refused to admit a claim by the petitioners for exemption from estate duty under s. 21, sub-s. 1, of the Finance Act, 1894.

The petitioners asked for a declaration that the two investments representing the sums of 4376*l.* 5*s.* and 13,630*l.* 17*s.* 11*d.* were exempt from estate duty on the death of Emmeline, Viscountess Torrington as being personal property settled by a disposition made by a person dying before August 1, 1894, in respect of which property probate duty had been paid.

Upjohn, K.C., and *W. A. Jolly*, for the petitioners. The question is whether the two items of settled property which passed upon the death of Emmeline, Viscountess Torrington on June 7, 1912, are exempt from the payment of estate duty by virtue of s. 21, sub-s. 1, of the Finance Act, 1894. (1) She was not at her death competent to dispose of them, as they were

(1) Sect. 21, sub-s. 1, of the Finance Act, 1894, provides as follows: "Estate duty shall not be payable on the death of a deceased person in respect of personal property settled by a will or disposition made by a person dying before the commencement of this part of this Act, in respect of which property any duty mentioned in paragraphs one and two of the First Schedule to this Act, or the duty payable on any representation or inventory under any Act in force before the Customs and Inland Revenue Act, 1881, has been paid or is payable, unless in either case the deceased was at the time of his death, or at any time since the will or disposition took effect had been, competent to dispose of the property."

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brought into the settlement under the covenant to settle by the eighth Viscount.

We say that the legacy and residue were "personal property settled by a disposition" within the meaning of s. 21, sub-s. 1. Such disposition was, as regards the legacy, the marriage settlement by the eighth Viscount, or alternatively a composite settlement of the will of the seventh Lady Torrington and the marriage settlement; and similarly, in the case of the residue, the disposition was either the settlement by Lord Torrington, or that settlement together with Lady Molesworth's will.

Sect. 5, sub-s. 2, of the Finance Act, 1894, is in pari materia with s. 21, sub-s. 1. They cover much the same ground.

At the date of the covenant each interest was in expectancy. As soon as each testator died, it attached, and at that moment became settled property just as if it were settled by the will, and probate duty was paid on it. The case of *Attorney-General* v. *Dodington* (1) meets the present case. There the settlement was composite, consisting of two documents, a settlement and a will. All that is necessary to entitle to exemption is that probate duty should have been paid. That case was approved by the House of Lords in the Irish case of *Inland Revenue Commissioners* v. *Priestley* (2), where the facts were practically the same. Those two cases throw light on the meaning of s. 21, sub-s. 1, and s. 5, sub-s. 2. *Attorney-General* v. *Earl Londesborough* (3) is identical with the present case. There is also a Scottish case of *Lord Advocate* v. *Harvey's Trustees* (4), which is against the contention of the petitioners, but it is distinguishable upon the ground that it depended upon Scottish law, which is somewhat different from English law, as to the effect of a covenant to settle after-acquired property. According to Scottish ideas the legacy and the residue pass to the legatee absolutely, subject to an obligation to settle, which can be specifically enforced. According to English law the legacy is regarded as actually settled from the first on the principle that equity regards that as done which ought to be done. The case of *Tailby* v. *Official Receiver* (5) shews the true

(1) [1897] 1 Q. B. 722; [1897] 2 Q. B. 373.
(2) [1901] A. C. 208.
(3) [1905] 1 K. B. 98.
(4) (1901) 39 S. L. R. 71.
(5) (1888) 13 App. Cas. 523.

difference between the English and the Scottish law. Here in each case a settlement and a will formed together a composite settlement which took effect when the testatrix died, each legacy thereupon became settled property, probate duty was paid, and the case comes within the exemption of s. 21, sub-s. 1. When once the distinction of the Scottish case is arrived at, this case is covered by the authority of the English cases.

Where there is any doubt, a taxing statute must be construed in favour of the subject: *In re Studdert.* (1) A conveyancer's, not a popular, construction must be adopted: *Attorney-General* v. *Mitchell* (2); *Attorney-General* v. *Beech.* (3) Taking the conveyancer's construction, there would clearly be a joint settlement.

When the probate duty became payable, there was a trust affecting the property. The eighth Viscount was, according to English law, in equity a trustee of his covenant. At the death of each testatrix, what was before merely a spes successionis became embodied as property and he was trustee of it. The present case rests wholly upon the principle that equity regards that as done which ought to be done, and, as that does not appear to be a principle applicable in the Scottish Court, the Scottish case does not apply.

Sir J. Simon, S.-G., and *T. J. C. Tomlin*, for the Crown. The petitioners say that s. 21, sub-s. 1, does not use the words "settled property" (which are the words of s. 5, sub-s. 2), and that therefore cases decided upon s. 5, sub-s. 2, do not apply; and also they say that the property here in question is property settled by a composite settlement. Those two arguments are mutually destructive. The language of s. 21, sub-s. 1, is extraordinarily wide. The property in respect of which duty is paid must be "personal property settled" by any will or disposition. By the definition clause, s. 22, sub-s. 1 (*h*), "settled property" is defined to be "property comprised in a settlement." So the words of s. 21, sub-s. 1, merely mean a particular class or species of property which falls within the general class of "settled property." When the scope and object of s. 21 are

(1) [1900] 2 I. R. 281, 400.
(2) (1881) 6 Q. B. D. 548, 555.
(3) [1897] 2 Q. B. 535, 542; [1898] 2 Q. B. 147; [1899] A. C. 53.

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looked at and compared with the scope and object of s. 5 the matter becomes clear. The general effect of the Act of 1894 was to make estate duty take the place of probate duty and to extend it to real estate. Sect. 5 has a similar object to s. 21, but a wider operation.

The question is whether, in the facts of the present case, probate duty has been paid in respect of the particular class of settled property which is the subject of s. 21. The words of the section are wide enough to cover almost every conceivable case, if the petitioners' view is correct. Probate duty is a duty on collection before probate can be obtained, and has no reference to any beneficial interest which might pass to any one: see per Lord Atkinson, *Winans* v. *Attorney-General* (No. 2). (1)

The Crown's submission is that what is settled here is not the estate of either testatrix or any part of that estate, but it is an absolute interest which passed to the eighth Lord Torrington under particular testamentary dispositions. The will in each case had no part in constituting the settlement and is only to be looked at to ascertain what property became subject to the covenant. Sect. 21 deals with settled property in the sense of property settled by will or disposition by a person dying and probate duty being paid on that. Sect. 1 of the Act divides all property into settled and unsettled. The object of s. 5 is to exempt all settled property which has once paid estate duty, and the object of s. 21 is to exempt all personal property which is settled and has paid probate duty. If that is so, this case is outside all the authorities except *Lord Advocate* v. *Harvey's Trustees*. (2)

In *Attorney-General* v. *Dodington* (3) there was without doubt a payment of duty out of settled property. It does not cover this case, because the facts are entirely different. Inasmuch as the Settled Land Act, 1882, is incorporated in the Finance Act, 1894, it is important to see what a compound settlement under the Settled Land Act is. Here the settlement operates and the covenant is only capable of coming into effect because the settlor afterwards becomes absolutely entitled to the property: *In re Wharton*. (4)

(1) [1910] A. C. 27, 34.
(2) 39 S. L. R. 71.
(3) [1897] 1 Q. B. 722; [1897] 2 Q. B. 373.
(4) (1910) 102 L. T. 531.

[EVE J. That case shews the terms usually employed now by conveyancers to exclude property which there is an obligation to settle from being caught.]

The basis of that case is that the legatee becomes absolute owner of the property. The only remedy against letting the property be caught is not to let the legatee become absolute owner, but to settle it independently.

As to the character of the obligation and the remedies upon it, at common law a mere expectation could not be assigned. *Tailby* v. *Official Receiver* (1) shews that equity will enforce a covenant to assign. There is no difference in kind between an assignment of property in the hands of trustees (to whom notice is given) and a contract to assign future property. There is no authority for saying that equity gives higher rights in the case of a contract to settle after-acquired property than in the case of a contract to settle property already in hand. If the means of enforcement of these contracts is considered, the matter becomes all the clearer. A volunteer under a marriage settlement cannot enforce the settlement unless the property is actually in the hands of the trustees.

No distinction is shewn or known to exist between English law and Scottish law in regard to covenants to settle after-acquired property. *Lord Advocate* v. *Harvey's Trustees* (2), which was a case of a post-nuptial settlement whereby the wife covenanted to settle her acquirenda, shows that if the legatee takes it is as an absolute gift and there is no duty paid upon any settled property. That case entirely covers the present case. Exemption, therefore, cannot be claimed. There is no distinction in substance between s. 21 and s. 5, and the Scottish case is decisive on the principle which ought to be applied. [He also referred to *In re Hartland* (3) and *Pullan* v. *Koe*. (4)]

Upjohn, K.C., in reply. It is a question of fact whether there was a binding settlement at the date of the death, and my submission is that there was, and *Pullan* v. *Koe* (4) is an authority for that contention. With regard to the Scottish case it has not been shewn that the Scottish law on this point is the same as English law.

(1) 13 App. Cas. 523.
(2) 39 S. L. R. 71.
(3) [1911] 1 Ch. 459.
(4) [1913] 1 Ch. 9.

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EVE J. The question to which the facts in this case give rise may, perhaps, be stated as follows: "Does the payment of probate duty in respect of personal property bequeathed by a testator dying before the coming into operation of the Finance Act, 1894, to a legatee already bound by covenant to settle such property exempt the property from liability to estate duty under the settlement?"

Bearing in mind the common practice of inserting in marriage settlements a covenant to settle after-acquired property of the wife, the instances in which a similar state of circumstances to those here existing may arise are sufficiently numerous to make the question of some practical importance from the point of view both of the Crown and the subject.

In the present case the eighth Viscount Torrington, by his marriage settlement dated January 24, 1885, covenanted to convey and assign to the trustees, to be held upon the trusts thereby declared, so much of any legacy or benefit to which he might thereafter become absolutely entitled under the will of his aunt, Mary Anne, Dowager Viscountess Torrington, as should be equal in value to 5000*l.* if the legacy should exceed that amount, and if not, then the whole of the legacy; and also any property, legacy, or interest up to the value of 20,000*l.* to which he might thereafter become absolutely entitled under the will of the Dowager Lady Molesworth.

The Dowager Viscountess died on January 26, 1885, two days only after the settlement; the Dowager Lady Molesworth died on May 16, 1888, and the settlor on October 20, 1889.

Out of the respective estates of the two ladies and pursuant to the before stated covenants in that behalf, the sums of 4376*l.* 5*s.* and 13,630*l.* 17*s.* 11*d.* have been paid to the trustees of the settlement.

On the death of each testatrix probate duty was paid on her personal property, including these respective sums, and the petitioners, the present trustees of the settlement, claim that by reason of such payment these sums are exempted from the estate duty otherwise payable in respect thereof on the recent determination of the second life interest under the settlement.

The claim to exemption is based on s. 21, sub-s. 1, of the Act

of 1894, which for this purpose can be read as follows: "Estate duty shall not be payable on the death of a deceased person in respect of personal property settled by a will or disposition made by a person dying before the 1st August, 1894, in respect of which property probate duty has been paid." The petitioners contend that each of these sums was either property settled at the date of the death of a person dying before August 1, 1894, or, alternatively, settled by a disposition made by a person dying before that date; and if the former of those alternatives is the right one then that the settlement was the marriage settlement of January, 1885; if the latter is the right one then that a compound settlement was in each case created by the will of the testatrix and the marriage settlement, and was a disposition within the sub-section. In either alternative they contend that each sum is brought within the express terms of the sub-section. The respondents, the Commissioners of Inland Revenue, on the other hand argue that the sub-section is dealing with a particular class or species of settled property, and that neither of these sums falls within that class or species.

It is not necessary for me to refer at any length to the general scope and intention of the statute. That has already been done far better than I could do it in more than one of the authorities to which my attention has been directed in the course of the argument. It is sufficient for me to observe that the Act deals with property under two heads, settled and not settled, and that it was the intention of the Legislature, as far as possible, to protect settled property, so long as it answered that description, from the liability to pay double duty or to pay duty more than once.

It is material to note that this intention, so far as it contemplated the exemption from a recurring liability to the payment of estate duty itself, was given effect to by s. 5, sub-s. 2. That section shews that the Legislature intended that settled property should pay duty so long as it remained settled once, and once only, and the object of that section was to give effect to that intention. But there remained the special cases of settled property on which probate duty had been paid or was payable, and it was felt that it would be a hardship that estate duty should be payable on such property in addition to the probate duty

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paid or payable. Accordingly such special cases were dealt with by sub-s. 1 of s. 21.

I base these observations on an extract from the judgment of Rigby L.J. in the case of *Attorney-General* v. *Dodington* (1) which I am about to read. The Lord Justice says (2): "I think that their intention"—that is the intention of the Legislature—"looked at broadly was that in the case of settled property, where probate duty has once been paid or become payable in respect of the interest of the settlor in it,"—an observation which I respectfully say I do not quite follow so far as the words "in respect of the interest of the settlor in it" are concerned—"that should be as effectual for the purpose of exempting the property from payment of the estate duty, as under s. 5, sub-s. 2, the fact that estate duty has once been paid on settled property is for the purpose of preventing a second duty being payable. It was felt that the case of property in settlement required great consideration, and that it would be a hardship in the case of such property that, when estate duty had once become payable in respect of it, it should again be payable on the lapse of each life, and that the same consideration applied to the case of settled property on which probate duty had once been paid or become payable. Accordingly the one case is provided for by s. 5, sub-s. 2, of the Act, and the other by s. 21, sub-s. 1."

Referring again to the sub-section, are not the respondents justified in their first contention that this sub-section is limited in its operation to a particular species or class of settled property, and that such class or species is property settled at the date when the liability to probate duty arose? I think they are, and I gather from Mr. Upjohn's argument that he does not dissent from this part of the respondents' argument. He joins issue with them when they further contend that it must be property in the settlement of which the will or disposition of the person on whose estate the probate duty is paid or payable forms an integral part. I will deal with this shortly, but on this first branch of the argument the petitioners maintain that the property with which I have to deal in this case was in fact settled

(1) [1897] 2 Q. B. 373. (2) [1897] 2 Q. B. 383.

at the respective dates when probate duty became payable in that at the death of each testatrix it was caught by the covenant to settle; a covenant which they argue operated really as an equitable assignment effectual for all practical purposes at the moment of the death of each testatrix.

In some senses, no doubt, that proposition is well founded; but is it so in all senses, and does the extent to which it is well founded bring this property within this exemption? Mr. Jolly invited me in considering this part of his argument to approach the construction of the sub-section from a conveyancer's point of view, which I daresay is quite the proper point of view from which to approach it, and he then went on, with, if he will pardon me for saying so, something less than his usual consistency, to add that there was little or no practical difference between the course which each testatrix actually adopted of leaving the legacy to a legatee, who was under contract to settle, and the course which she might have adopted of leaving the legacy direct to the trustees to be held upon the trusts of the settlement. With all due deference I think there is a very substantial difference. In the latter case, the property would in fact be effectively settled by the will of the testatrix. It is true that the settlement would be a compound settlement in this sense, that it would be made up of the will and the marriage settlement, but the trust would be executed on the death of the testatrix, and there would be no hiatus or gap, as Mr. Tomlin pointed out, between the title of the trustees and the will. But although no doubt by the course which has been adopted the property in the hands of the legatee, and to a less degree in the hands of the legal personal representatives, is affected by the trust, and by appropriate procedure could be protected and secured for the cestuis que trust, it cannot, I think, be said to have been effectively settled by the operation of the covenant alone; there was no executed trust. Such cases as *In re D'Angibau* (1) and *In re Plumptre's Marriage Settlement* (2) shew that the covenantor under a covenant to settle after-acquired property is not in all cases a trustee, and that, so long as it rests in covenant, there is no executed trust of property subject

(1) (1880) 15 Ch. D. 228. (2) [1910] 1 Ch. 609.

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to a covenant to settle after-acquired property. I think, therefore, the argument that, because on the death of the testatrix the property here became immediately subject to the covenant to settle, and because equity considers that done which ought to be done, the will and settlement adhere so closely as to obliterate all that intervenes, and make the property actually settled at the death of the testatrix, is unsound and fallacious. Nor could the property subject to the covenant be said in either case to be settled by the will; it clearly was not so. Neither will had any reference to the trusts; there was an absolute legacy in the one case, and a share of residue in the other; and so far as the evidence goes, there is nothing to shew that either testatrix even knew of the fact that her benefaction was subjected to the settlement.

But the section refers to dispositions other than wills, and no doubt includes dispositions of the nature of compound settlements. Before, however, treating any document as constituting a component part of a disposition of that nature, one must be satisfied that it is not a mere step in the title of the settlor. Mr. Tomlin has argued forcibly that the will in each case here is only material to be looked at for the purpose of ascertaining what property it was that became subject to the operation of the covenant, and that it really had no part or substance in constituting the settlement.

I think this argument is well founded and that the property in each case was neither settled at the date of the death of the testatrix nor settled by her will nor settled by any disposition of which her will formed a component part.

In my view, this sub-section deals with property in the settlement of which the will or disposition made by the person on whose property probate duty is paid or payable plays a part, and it is not sufficient to bring the case within the sub-section even to shew that the property is settled by some other instrument at the date when probate duty becomes payable, still less if it only be shewn to be subject to a covenant to settle. Before any right to exemption can be established it is necessary to find a will or disposition by the person on whose property probate duty is paid or payable constituting a part of the settlement.

Apart, therefore, from any authority on the construction of the Act, I should have come to the conclusion that this case does not fall within the sub-section. But the respondents have relied upon the decision of the Courts in Scotland in *Lord Advocate* v. *Harvey's Trustees.* (1) That was a case arising under s. 5, sub-s. 2, but the facts and the reasoning bring it entirely into line with this case, subject only to this observation —an observation which has been urged on behalf of the petitioners here—that there the parties were subject to the law of Scotland, and there is nothing to shew that on this question of equitable assignment and the effect of covenants to settle after-acquired property the law of Scotland and the law of England are identical. That is a perfectly fair observation. It is equally fair, on the other side, to say that there is nothing to shew that they are different; though this last observation may possibly be subject to this qualification, that there are some observations in the judgments in the Scottish Courts, to which Mr. Upjohn has drawn attention, calculated to raise a presumption that the law of the two countries in respect of these matters is not identical. It is because I think that the judgments do perhaps afford ground for that conclusion that I have thought it my duty to construe the Act without reference to that case, but if there be, in fact, no difference in the Scottish and English law on these points, I should, of course, have felt it my bounden duty to follow that case, treating it as an authority binding upon me. It is not necessary for me to say more upon this point, because, as I say, I have stated, as far as I can, the independent reasons which have led me to the conclusion that this petition fails. I will therefore make a declaration that the petitioners are not entitled to the exemption which they claim, and they must pay the costs of the petition.

Solicitors: *Haslewood, Hare & Co., for Cheale & Son, Tunbridge Wells; Solicitor of Inland Revenue.*

(1) 39 S. L. R. 71.

G. M.

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In re MONCKTON'S SETTLEMENT.
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[1913 M. 1301.]

Settlement—Construction—Omission of Words of Limitation—Equitable Estate in Freehold and Copyhold Property—Estate for Life of Trustee—Personal Estate subject to Trust for Conversion into Realty—Absolute Interest—Mode of Assurance of Capital Moneys—Settled Land Act, 1882 (45 *&* 46 *Vict. c.* 38), *s.* 22, *sub-s.* 5.

By a settlement made in 1908 the settlor (being then entitled for a contingent reversionary equitable estate in fee simple to freehold hereditaments and for a corresponding estate to copyhold hereditaments and investments in personalty directed to be held upon the same trusts as capital money arising under the Settled Land Act, 1882, from the freehold hereditaments) granted unto a trustee, first, the freehold and copyhold hereditaments, and secondly the investments, to hold the same as to the freehold hereditaments and the investments "to the use of the trustee according to the customs of the several manors of which they are respectively held"; and it was thereby agreed that the trustee, his executors or administrators, or other the trustee or trustees for the time being, should stand possessed of the freehold hereditaments upon trust for the settlor during his life, and after his death upon such trusts in favour of his widow, children, or remoter issue, or the respective husbands or wives of such children, as he should appoint, and subject thereto, in trust for his sons and daughters in tail as therein mentioned, with an ultimate trust for the settlor, his heirs and assigns. The copyhold hereditaments were to be held on corresponding trusts, and the investments were to be applied, first, in discharging an incumbrance created by the settlor, and as to the residue (if any) in the purchase of freehold hereditaments to be assured to the trustee or trustees in fee simple upon the same trusts as were thereby declared of the freehold hereditaments thereby assured. On the death of the trustee in 1913:—

Held, that as to the freehold and copyhold hereditaments the trustee took a life interest only, and that the trusts of the settlement came to an end on the death of the trustee.

Held, however, that as to the investments no words of limitation appropriate to real estate were necessary to pass an absolute interest to the trustee, s. 22, sub-s. 5, of the Settled Land Act, 1882, having made no alteration in the law in this respect, and that the trusts of the settlement did not come to an end on the death of the trustee.

Words of limitation are unnecessary in disposing of the equitable interest either in personal property subject to a trust for conversion into land or in the prospective proceeds of sale of land which is under a

trust for conversion into money. The conveyancer can have regard to either the interest in the existing property or the interest in the property which is ultimately to represent the existing property after conversion; and, if either the existing property or the ultimate property is of the nature of personalty, he can properly deal with the equitable interests in that property without using the word "heirs" or its equivalent "in fee simple."

ADJOURNED SUMMONS.

Under or by virtue of an indenture of settlement dated May 30, 1856, and a disentailing assurance dated November 20, 1894, certain freehold and copyhold hereditaments and investments in personal estate and cash stood limited to such uses and upon such trusts as Edward Monckton and his son George Monckton should by deed jointly appoint.

By an indenture of resettlement dated November 21, 1894, made between Edward Monckton of the first part, George Monckton of the second part, and trustees of the third part, Edward Monckton and George Monckton in exercise of their joint power appointed that the said freehold hereditaments should thenceforth go and remain to such uses and upon such trusts as they should jointly appoint, and in default of appointment to the use of Edward Monckton during his life and after his decease to the use of George Monckton in fee simple if he should be living at the death of Edward Monckton, but if he should be then dead to the use of his first and other sons successively in tail male with divers remainders over; and Edward Monckton and George Monckton in further exercise of their joint power appointed that the said copyhold hereditaments should thenceforth go and remain upon trusts corresponding with the uses thereinbefore limited of the said freehold hereditaments; and Edward Monckton and George Monckton in further exercise of their joint power appointed that the investments in personal estate and cash then in the hands or under the control of the trustees of the said settlement of May 30, 1856, and all other moneys, stocks, funds, and securities which, or the produce of which, were held upon the trusts affecting money arising under the powers of sale and exchange contained in the said settlement, should be held by the trustees of the now stating indenture, their executors and administrators, or

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assigns, upon the same trusts and subject to the same powers and provisions as capital money arising under the Settled Land Act, 1882, from the freehold hereditaments thereby settled.

By an indenture of mortgage dated November 12, 1907, George Monckton conveyed to certain mortgagees, first, the said freehold and copyhold hereditaments then subject to the said indenture of resettlement, and secondly all the moneys and investments then liable to be invested in the purchase of hereditaments thereunder, to hold the said premises as to the freehold hereditaments and moneys and investments to the use of the mortgagees, their heirs and assigns, and as to the copyhold hereditaments to the use of the mortgagees, their heirs and assigns, according to the custom of the manors, subject as to all the said premises to the life estate of Edward Monckton and to the event of the estate of George Monckton being defeated by his death in the lifetime of Edward Monckton, but free from the joint power of appointment vested in Edward Monckton and George Monckton, and subject also to redemption on payment of the principal sum of 15,000*l.* on the death of Edward Monckton.

By an indenture of settlement dated February 24, 1908, and made between George Monckton of the one part and B. C. K. Dawson of the other part, George Monckton granted unto the said B. C. K. Dawson, first, all the freehold and copyhold hereditaments then subject to the uses or trusts limited by or declared in the said resettlement of November 21, 1894, and secondly all the stocks and funds mentioned in the second part of the schedule thereto (which represented the moneys then subject to he trusts of the said resettlement), and all other the moneys and investments which then were or might become subject to the trusts of the said resettlement, "to hold the same unto the said B. C. K. Dawson as to the said freehold hereditaments, stocks, funds, moneys and investments, to the use of the said B. C. K. Dawson according to the customs of the several manors of which they are respectively held," freed as to all the said premises from the joint power of appointment vested in the said Edward Monckton and George Monckton under the said indenture of resettlement but subject to the estates subsisting therein under the same indenture during

the life of the said Edward Monckton, and subject also as therein particularly mentioned; and it was thereby agreed that the said B. C. K. Dawson, his executors or administrators, or other the trustee or trustees for the time being of the indenture now being stated (all of whom were thereinafter referred to as "the trustee or trustees") should after the death of Edward Monckton in the lifetime of George Monckton stand possessed of such of the hereditaments thereby assured as were of freehold tenure, upon trust for George Monckton and his assigns during his life, and after his decease upon such trusts for the benefit of any widow, children, or remoter issue of George Monckton, or the respective husbands or wives of such children, as George Monckton might as therein mentioned appoint, and subject to any such appointment upon trust for the first and every other son of George Monckton successively, one after the other in order of seniority in tail, and subject thereto, upon trust for all the daughters of George Monckton in equal shares as tenants in common in tail with cross remainders between them in tail, and subject thereto, upon trust for George Monckton, his heirs and assigns; and it was thereby agreed that the trustee or trustees should after the death of Edward Monckton in the lifetime of George Monckton stand possessed of such of the hereditaments thereby assured as were of copyhold tenure upon such trusts and with and subject to such powers and provisions as should correspond with the trusts, powers, and provisions therein declared and contained concerning the freehold hereditaments thereby assured or as near thereto as the different tenure of the property would permit; and it was thereby agreed that the trustee or trustees should after the death of Edward Monckton in the lifetime of George Monckton stand possessed of the stocks, funds, investments and moneys thereby assured, and all capital moneys and investments which might have arisen from any sale of hereditaments subject to the subsisting uses or trusts of the said resettlement of November 21, 1894, upon trusts to convert the same into money and to apply the net proceeds thereof, in the first place, in or towards discharging the said sum of 15,000*l.* charged upon the said premises by the said indenture of November 12, 1907, and any other sum or sums for the time

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being charged thereon in exoneration, so far as the same would extend, of the freehold and copyhold hereditaments thereby settled, and upon trust as to the net residue thereof (if any) to apply the same in the purchase of freehold hereditaments in England or Wales to be assured to the trustee or trustees in fee simple upon the like trusts and with and subject to the like powers and provisions as were therein declared and contained of and concerning the said freehold hereditaments thereby assured.

The second schedule contained a list of the investments consisting of English railway stocks and a sum of Consols.

B. C. K. Dawson died on February 13, 1913, intestate. Edward Monckton was still living.

This was an originating summons taken out by George Monckton against his wife and infant children and the administratrix of B. C. K. Dawson, asking for a declaration that upon the true construction of the settlement of February 24, 1908, and having regard particularly to the absence of words of limitation in the conveyance of the freehold and copyhold hereditaments, moneys, and investments thereby settled, to B. C. K. Dawson, as the trustee thereof, the trusts of the said settlement came to an end on his death.

J. W. F. Beaumont, for the plaintiff. The trusts of the settlement came to an end with the death of the trustee, to whom a life interest only was limited. The habendum cannot be enlarged into a fee simple estate either by reason of the subsequent limitations in favour of the beneficiaries, which are technically consistent with an estate pur autre vie, or by the fact that the settlor's estate was an equitable estate, the legal estate being outstanding in his mortgagees. This is a case in which equity follows the law. The decision of Buckley J. in *In re Irwin* (1) is directly in point. The decision of Joyce J. in *In re Tringham's Trusts* (2) is distinguishable, as the question there did not turn on the estate limited to the trustee, but on the beneficial interests limited to the beneficiaries.

F. Whinney, for the settlor's wife and children. The present

(1) [1904] 2 Ch. 752. (2) [1904] 2 Ch. 487.

case is not governed by *In re Irwin*. (1) In that case there were no words of limitation in the trusts in favour of the beneficiaries. In the present case the settlor had only an equitable estate and the trustee in such a case is not a trustee in the complete sense: see per James V.-C. in *Castellan* v. *Hobson* (2): "Cases have frequently occurred in this Court in which what is called the intermediate trustee of a mere equity has been disregarded altogether." The observations of James V.-C. were approved by Lord Macnaghten in *Tollhurst* v. *Associated Portland Cement Manufacturers*. (3) The subsequent limitations in favour of the beneficiaries and the trusts of the capital moneys shew the settlor's real intention to have been to settle the equitable fee simple, and enable the Court to correct or disregard the obvious omission or mistake in the habendum to the trustee. Where the intention to pass the equitable fee simple is plain the Court will give effect to it: *In re Tringham's Trusts*. (4)

H. L. Lewis, for the administratrix of the deceased trustee.

SARGANT J. stated the facts and read the material parts of the settlement of 1908, and continued: It is perfectly clear that the intention of the settlor was to transfer his whole estate and interest in the property to the trustee to be held by him for the benefit of the beneficiaries under that settlement; and the question is, whether, having regard to that intention, I can give effect to it notwithstanding the fact that in the conveyance to the trustee there are no words of limitation such as "heirs" or "in fee simple." The actual habendum is clearly defective; something has been omitted, but I do not think that I can hold that proper words of limitation such as "heirs" or "in fee simple" can be implied. I must take it that, so far as that habendum goes, it is an habendum to the use of the trustee simply, conferring a bare life interest; and the question then is, whether the subsequent indication of intention arising from the limitation of the much more extensive trust estates, or apparent trust estates, enables me to say that more than a bare life interest has passed to the trustee. In my

(1) [1904] 2 Ch. 752.
(2) (1870) L. R. 10 Eq. 47, 51.
(3) [1903] A. C. 414, 421.
(4) [1904] 2 Ch. 487.

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opinion I am not able to say that, much as I should like to do so. The rule is fairly well settled that in the case of an executed document as distinguished from an executory document the same words of limitation are necessary to convey an equitable estate in fee simple as would have been necessary if the conveyance had been one of a legal estate in fee simple. Equity follows the law in that respect. If authority be wanted for that proposition *In re Irwin* (1), by which I am bound, seems to me to be directly in point. In that case by a post-nuptial voluntary settlement freehold property, to some of which the settlor was entitled for a beneficial interest only, was assigned to trustees without words of limitation upon trust for sale and investment and to pay the income to the wife of the settlor for life, and after her death to the settlor during his life or until bankruptcy, and subject thereto upon trust for their children, and Buckley J. found that the intention of the settlor obviously was to convey his whole interest in the property; and the settlement being one by way of trust for sale and settlement of the proceeds of sale, it was quite unnecessary, so far as the children were concerned, to purport to give them estates with words of limitation because the trust simpliciter of the proceeds of sale and of the investments representing the same would without more vest in them the absolute reversionary interest in those proceeds of sale. The learned judge, however, came to the conclusion that the presumed intention of the settlor, plain as it might be, was not sufficient to get over the omission of the word "heirs" in the conveyance itself, and he distinguished a previous case decided by Joyce J. of *In re Tringham's Trusts*. (2) In *In re Tringham's Trusts* (2) there was no question as to what estate had passed to trustees by virtue of a conveyance by a person who had an equitable interest. The question was as to the extent of the interests given to the beneficiaries themselves, and therefore *In re Tringham's Trusts* (2) does not seem to me to be so much in point in the present case as *In re Irwin*. (1)

Mr. Whinney very ingeniously attempted to distinguish *In re Irwin* (1) on the ground that in *In re Irwin* (1) there were no words of limitation attached to the estates of the beneficiaries, while in

(1) [1904] 2 Ch. 752. (2) [1904] 2 Ch. 487.

the present case the settlement itself contains trusts in favour of the beneficiaries in tail with proper words of limitation, and he urges on me that I may disregard the intermediate estate of the trustee, as being only a sort of primary estate, and look to the secondary or ultimate equitable estates of the cestuis que trust and really regard the settlement as being in effect a conveyance by the settlor of his beneficial interest to the beneficiaries, and, if looked at in that light, no doubt the words of limitation in favour of the beneficiaries would be sufficient to pass all that the settlor had. I appreciate that distinction for what it is worth, but in my opinion it is not a vital or material distinction for this reason, namely, that in *In re Irwin* (1) there was, as I have already pointed out, ample language to pass the whole interest to the beneficiaries, and there is really nothing more in the present case. Indeed the analogy is fairly close, because in *In re Irwin* (1) it was quite impossible to give effect to the obvious intention of the settlement in respect of the estates given to the beneficiaries unless the Court held that the trustees took more than an estate for their own lives, and I do not see how anything more can be said in the present case. Technically it would be possible in the present case to read this settlement so as to give effect to all the limitations in favour of the beneficiaries by holding that the settlement was a settlement of an estate pur autre vie because such an estate could in fact be limited in the way indicated in the settlement. Of course that would be a grotesque result and one which offends common sense, but I am not sure that it offends common sense more than it is offended by the decision in *In re Irwin.* (1) The fact is that in an interpretation of documents dealing with real estate certain technical rules have been definitely laid down and must be carefully observed by the Court unless uncertainty and confusion are to be introduced into this branch of the law. In my judgment, if I came to any other conclusion than that at which I have arrived I should not only be distinguishing the case of *In re Irwin* (1) without any real difference, but I should be going back on the clear general rule that an executed limitation of an equitable estate must prima facie be read in

(1) [1904] 2 Ch. 752.

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the same sense and with the same result as a limitation of a legal estate.

I must declare, therefore, as regards the freeholds that on the true construction of the settlement the limitations of the settlement have come to an end on the death of the trustee. I propose to extend that declaration to the copyholds and the capital moneys also, but I will give an opportunity to Mr. Whinney as representing the children to look into the question of whether there is some special custom with regard to these copyholds which renders it unnecessary for the ordinary words of limitation to be used with regard to them. I will also give him an opportunity of dealing with a question for which he is not prepared at present, namely, whether the capital moneys which are held upon trusts corresponding with those of the freeholds must be dealt with by as strict words of limitation as the freeholds themselves.

July 25. Pursuant to the leave so granted the summons came on again to be argued as to the copyholds and personal estate. As regards the copyholds it was now ascertained that there were no special customs or circumstances differentiating them from the freeholds.

F. Whinney, for the wife and children of the settlor. There being no special customs relating to the assurance of the copyholds I admit that the former decision applies as well to the copyholds as to the freeholds. As regards the personal estate existing at the date of the settlement the case is different. Words of limitation necessary for the assurance of freehold property were never necessary for the assurance of personal property subject to a trust for conversion into realty. By the Fines and Recoveries Act, 1833, s. 71, assurances of this kind of property are directed to be by "assignment by deed"; and in the precedent books the assignment is generally made to an assignee, "his executors, administrators and assigns," though in some the word "heirs" is used ex abundanti cautela only: Elphinstone's Introduction to Conveyancing, 5th ed. pp. 503, 504; *Mills* v. *Fox* (1); *In re Harvey*. (2) It is suggested on the

(1) (1887) 37 Ch. D. 153. (2) [1901] 2 Ch. 290.

part of the plaintiff that the law has been altered by the provisions contained in s. 22, sub-s. 5 (1), of the Settled Land Act, 1882, but the Legislature had no intention of making such a sweeping change in the law and practice of conveyancing by that sub-section or of altering the statutory method of disentailing the class of property prescribed by s. 71 of the Fines and Recoveries Act, 1833. The words of the sub-section are for the "purposes of disposition," not for the modes of disposition.

J. W. F. Beaumont, for the plaintiff. Whatever the law was prior to the Settled Land Act, 1882, it has been altered by s. 22, sub-s. 5, of that Act, which renders words of limitation appropriate to real estate necessary to the complete disposition of capital moneys. The expression "the purposes of disposition" includes the modes of assurance.

[SARGANT J. referred to *In re Walker*. (2)]

That case dealt with the devolution and not with the mode of assurance of capital moneys.

Cur. adv. vult.

July 31. SARGANT J. delivered the following written judgment:—In this case I have already decided that so far as the freeholds are concerned the absence of any proper words of limitation in the operative part of the settlement of February 24, 1908, prevented any greater estate passing to the trustee B. C. K. Dawson and through him to the intended beneficiaries than an estate for the life of the said B. C. K. Dawson which has now determined by his death. The question as to the copyholds and the investments comprised in the same settlement was adjourned for further argument and has now to be dealt with.

(1) Settled Land Act, 1882, s. 22, sub-s. 5: "Capital money arising under this Act while remaining uninvested or unapplied, and securities on which an investment of any such capital money is made, shall, for all purposes of disposition, transmission, and devolution, be considered as land, and the same shall be held for and go to the same persons successively, in the same manner and for and on the same estates, interests, and trusts, as the land wherefrom the money arises would, if not disposed of, have been held and have gone under the settlement."

(2) [1908] 2 Ch. 705.

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As regards the copyholds it has now been ascertained that there are no special customs or circumstances differentiating them from the freeholds, and Mr. Whinney has accordingly admitted that my decision must apply to the copyholds also. As regards these also I must therefore declare that the limitations of the settlement came to an end on the death of the trustee. The investments stand on a very different footing. They actually were at the date of the settlement of 1908 personal estate and could as to the total or any partial interest therein be disposed of fully and absolutely without any words of limitation. And so far as they are concerned the question is whether their equitable conversion into realty under the trusts of the settlement of November 21, 1894, makes it necessary when dealing with the equitable interest in them to use the words of limitation appropriate to real estate. On this point the provisions of s. 71 of the Fines and Recoveries Act (3 & 4 Will. 4, c. 74) are of great assistance. Under that section the assurance prescribed for the disentailing of investments settled in this way is a deed of assignment, that is as I read the words a deed not requiring the words of limitation appropriate to real estate. And in a number of precedents of repute such as Bythewood and Jarman, 3rd ed. vol. ix. p. 303, Davidson's Precedents, 3rd ed. vol. iii. pt. ii., precedent 38 at p. 1232, and Underhill's Encyclopædia of Forms and Precedents, vol. v., precedents 5 and 6 at pp. 438 and 444, the disposition of equitable interests in investments in this position is by way of assignment to assignees, their executors, administrators, and assigns. The instances to the contrary which I have found are in Key and Elphinstone's Precedents, 3rd ed. vol. i. p. 667, and in Davidson's Concise Precedents, 19th ed. p. 710, precedent 171, where the beneficial interests in trust funds of this kind are conveyed to a trustee and his heirs; but this form is probably adopted ex abundanti cautela and cannot in my judgment displace the inference to be drawn from the language of s. 71 and from the very general practice of conveyancers as illustrated in the foregoing references: see also *Mills* v. *Fox* (1) and *In re Harvey*. (2)

But Mr. Beaumont has argued that though this may have

(1) 37 Ch. D. 153. (2) [1901] 2 Ch. 290.

been so prior to the Settled Land Act, 1882, s. 22, sub-s. 5, of that Act expressly puts "capital moneys" on precisely the same footing as settled land with regard to amongst other things "disposition," and so renders the use of the word "heirs" essential to a full disposition. It is obvious, however, that some limitation must be put on the generality of the words of this sub-section as regards disposition, since it cannot affect the mode of transfer of the legal interest in capital moneys and investments by the trustees who hold them. And further it can hardly have been meant to alter the statutory method of disentail prescribed by s. 71 of the Fines and Recoveries Act and to render an assignment by deed of capital moneys ineffectual for that purpose. The words may perhaps be satisfied by supposing them to be a recognition of the fact that in the case of such moneys it would be necessary to have some disentailing assurance corresponding with that required in the case of land. They do not in my judgment make it essential to apply the same words of limitation in disposing of the absolute interest in capital moneys which would be essential in dispositions of estates of inheritance in land.

The foregoing decision that the use of the word "heirs" is unnecessary in disposing of the equitable interest in personal property subject to a trust for conversion into land is not intended in any way to suggest that the use of the word "heirs" would be necessary in a disposition of the absolute interest in the prospective proceeds of sale of land which is under a trust for conversion into money. In such cases the equitable interest in these prospective proceeds can obviously be and ordinarily is transferred without the use of any such words. The conveyancer can have regard to either the interest in the existing property or the interest in the property which is ultimately to represent the existing property after conversion; and if either the existing property or the ultimate property is of the nature of personalty he can properly deal with the equitable interests in that property without using the word "heirs" or its equivalent "in fee simple."

Accordingly as regards the investments I must declare that the trusts have not come to an end with the death of the trustee.

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But as there is a trust to use these investments in discharge of a reversionary mortgage largely exceeding their value in exoneration of the hereditaments on which that mortgage is secured, I am afraid that this declaration will not be of much assistance to the beneficiaries under the settlement of 1908.

As regards future capital moneys, since they would arise from what is now actually land and would then be notionally land, Mr. Whinney in the course of the argument admitted that they stood on the same footing as the freeholds and the copyholds. The declaration as to capital moneys will therefore be strictly limited to the investments specified in the second schedule to the settlement of 1908.

Solicitors: *Stephenson, Harwood & Co.; Beaumont & Son.*

A. C.

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Statute of Frauds (29 *Car.* 2, *c.* 3), *s.* 4—*Sale of Land—Contract—Memorandum—Written Offer to purchase—Time for Acceptance limited—Acceptance out of Time—Subsequent Conduct—Implied Parol Agreement either to extend Time or to treat Acceptance as valid—Specific Performance—Vendor's Action—Term left open in Offer and Acceptance—Term solely in Vendor's Favour—Waiver by Vendor at the Bar.*

Although a written offer to purchase land limits a definite time for acceptance, with a proviso withdrawing the offer if not accepted within that time, that time limit may nevertheless be extended by a parol agreement before it expires, or, if not so extended, the actual acceptance though out of time may by a parol agreement be treated as a valid acceptance, and in neither case is any memorandum of the parol agreement required by the Statute of Frauds.

Goss v. *Lord Nugent* (1833) 5 B. & Ad. 58, distinguished.

A parol agreement of either nature may be implied by the conduct of the parties subsequent to the actual acceptance.

Bruner v. *Moore* [1904] 1 Ch. 305, 312, applied.

A purchasers' offer provided that the purchase-money should be paid as to 250*l.* on completion and as to the balance within two years bearing interest at 5 per cent. and to be secured to the vendor's satisfaction.

The vendor accepted the offer subject to the purchase-money being secured to his satisfaction.

Two months before the date fixed for completion, and while the

method of securing the balance of the purchase-money was still in negotiation, the purchasers withdrew their offer.

The vendor sued for specific performance or damages:—

Held, that the provision for securing the balance of the purchase-money to the vendor's satisfaction did not prevent the offer and acceptance from constituting a binding contract, and that in any case, as the provision was solely for the vendor's benefit, he could waive it at the Bar.

Hawksley v. *Outram* [1892] 3 Ch. 359, applied.

WITNESS ACTION.

This was a vendor's action for specific performance.

The plaintiff was a dealer in fancy goods at 60/61, Burlington Arcade, which premises he held from Lord Chesham under a yearly tenancy granted by a lease of March 30, 1899, and which he could not assign without his landlord's consent. He also had other premises in the arcade.

The defendants were overcoat makers and outfitters carrying on business in partnership as Studd & Millington.

Some time prior to August 30, 1912, Messrs. Stiles, house agents, having heard that the plaintiff's premises 60/61, Burlington Arcade were for sale, included them in their advertisements without any instructions from the plaintiff, and on August 30, 1912, the defendants wrote for particulars. On September 2, 1912, Messrs. Stiles, having communicated with Tonkin, the plaintiff's solicitor, replied giving particulars of the property and saying "if you are prepared to make an offer for the lease we will communicate with our client and do our best to arrange satisfactory terms for you." They also said they would ascertain whether there would be any restriction as to the defendants carrying on their particular business in the arcade.

The terms of a formal offer were then settled between Messrs. Stiles and the defendant Millington, who was acting for his firm.

On Monday, September 16, 1912, Messrs. Stiles wrote to Millington enclosing "copy of the formal offer as amended by you which we shall be glad if you will kindly let us have next Thursday duly signed by your partner and yourself when we will do our best in the matter to get same accepted . . . . We also enclose a duplicate copy of the offer which we thought you would like to have."

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On September 20, 1912, the defendants signed the offer and sent it to Messrs. Stiles, who received it on the same day and sent it round to Tonkin, the plaintiff's solicitor. On the same day Tonkin forwarded the offer to the plaintiff, who received it either on September 21 or September 23. This offer, which omitted the day of the month, was as follows:—

"September 1912.

"C. Morrell Esq.

"60/61 Burlington Arcade.

"We hereby offer to purchase your interest in the lease of these premises for the sum of one thousand pounds (1000) to include the fixtures and fittings, completion to take place at the end of March 1913, the purchase-money being paid as to 250*l.* down and as to the balance within two years, bearing interest at 5 per cent. and to be secured to your satisfaction, possession to be given March 24th 1913.

"This offer is subject to our being able to obtain a new lease from Lord Chesham in the usual form granted by the estate at the same rent as you are now paying viz. 260*l.* per annum, exclusive of rates and taxes, and to our being permitted to carry on upon the premises the business of overcoat makers and outfitters.

"You are for the space of a month to be at liberty to accept this offer conditionally upon your being able to make satisfactory arrangements for the realisation of your stock and your premises in the Arcade and if not accepted conditionally or otherwise within that time the offer is withdrawn.

"Yours faithfully,

"C. M. Studd.

"S. Millington."

On October 18, 1912, the plaintiff's solicitor, having communicated with the plaintiff and with the landlord's solicitors, posted the following acceptance to Messrs. Stiles:—

"Friday, Oct. 18, 1912.

"Messrs. C. M. Studd and S. Millington

"Dear Sirs

"Re 60/61 Burlington Arcade.

"Referring to your offer received by Messrs. Stiles on the

20th ultimo, I am instructed by my client Mr. Charles Morrell as follows:—

"Subject

"(a) To my client being able to make satisfactory arrangements for the realisation of his stock and his other premises in the Arcade

"(b) To the purchase-money being secured to his satisfaction

"(c) To the consent of Lord Chesham to the carrying on upon the premises of your business of 'Overcoat Makers and Outfitters'

To accept your said offer.

"I have already communicated with Lord Chesham's solicitors and expect to hear from them early next week.

"Yours faithfully,

"S. Tonkin."

These conditions were already contained in the defendants' offer and are hereinafter referred to as conditions (a), (b), and (c).

This formal acceptance was received by Messrs. Stiles on October 19, 1912, and on the same day they wrote to the defendants enclosing a copy thereof and inquiring the name of their solicitors and what security they could give for the deferred portion of the 1000*l.* premium. This letter was delivered by hand to the defendants on the same day.

On October 24, 1912, the defendants supplied the plaintiff's solicitor with references as to their financial stability. The plaintiff's solicitor took up these references and found them satisfactory. Considerable further correspondence and a few interviews as to conditions (a), (b), and (c) then ensued, during which condition (a) was waived and condition (c) complied with, the landlord's consent to a new lease being also obtained.

As to condition (b) various proposals were discussed. It was originally proposed that the defendants should give a charge on their book debts, but this they were unwilling to do. They offered instead to pay 500*l.* on completion and give bills for the balance. The plaintiff refused to accept bills, but was willing to take a mortgage on certain Conduit Street leaseholds. Ultimately, however, on December 24, 1912, the defendants'

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solicitor wrote to the plaintiff's solicitor stating that the defendants had decided to pay cash on completion less the usual deposit of 10 per cent. which they would pay on the signing of the contract and asking for draft contract for approval. A draft contract based on cash payment was sent on January 3, 1913, but it was not approved, and this final proposal fell through.

On January 10, 1913, the defendants' solicitor withdrew their original offer.

On January 11, 1913, the plaintiff's solicitor replied that there was a binding contract.

On January 28, 1913, the plaintiff commenced this action for specific performance of the agreement contained in the original offer and acceptance or for damages.

During the course of the negotiations as to conditions (a), (b), and (c) it was never suggested that the original acceptance was out of time, but after action brought the defendants for the first time discovered that the word "month" in their offer legally meant a "lunar month"—*Bruner* v. *Moore* (1)—and in addition to other defences they raised the point that the acceptance was out of time, as a lunar month from the date of the offer expired on October 18, 1912.

The plaintiff alleged that Messrs. Stiles were the defendants' agents for the purpose of accepting the offer, in which case the acceptance posted to them on October 18, 1912, was in time even if on the construction of the offer a lunar month was the period intended.

If this was not so, the plaintiff alleged that by an agreement between himself and the defendants (to be implied from their conduct and the circumstances of the case) either the period for acceptance was extended till October 20, 1912, or alternatively the actual acceptance was treated as a proper acceptance, and that in any event the defendants, who had never disputed that the acceptance was a proper acceptance, were estopped from setting up the contrary.

The defendants did not admit that Messrs. Stiles were their agents, or that the lunar month was extended, or that the

(1) [1904] 1 Ch. 305, 312.

acceptance was ever treated as a proper acceptance, or that they were estopped, and they relied on the Statute of Frauds.

They also said that the offer and acceptance did not constitute a concluded agreement, but were only part of negotiations which did not result in a concluded agreement.

The evidence shewed that in reliance on the contract the plaintiff had restricted his business at Burlington Arcade and had made arrangements for storing his goods elsewhere and had thereby incurred loss and expense.

Hon. Frank Russell, K.C., and *Andrewes-Uthwatt*, for the plaintiff. In this Court we cannot dispute that in an ordinary legal document such as the offer of September 20, 1912, the word "month" means "lunar month": *Bruner* v. *Moore.* (1) In this case, however, that month either ran from the day the plaintiff received the offer, i.e., September 21 at the earliest, or, as the day of the month was omitted, it ran from the end of September. In any case it is evident that Messrs. Stiles were the defendants' agents to receive the acceptance, and as it was posted to them on October 18 it was in time.

Failing these points it is manifest that the defendants' conduct after receiving the acceptance implied either a previous agreement to extend the time, or an agreement to treat the acceptance as valid, and in any case they are estopped from denying its validity: *Bruner* v. *Moore.* (1)

The Statute of Frauds is no answer to this point.

The offer and acceptance if valid clearly constituted a concluded contract which is unaffected by the subsequent negotiations on minor details.

Micklem, K.C., and *L. F. Potts*, for the defendants. The lunar month ran from September 20, the actual date of the offer, which was automatically withdrawn if not accepted by October 18. Messrs. Stiles were not our agents. The acceptance was therefore out of time and merely constituted a counter offer which we never accepted: *Hebb's Case.* (2) At all events we did not accept in writing.

The time limit was an essential condition of our offer. Any

(1) [1904] 1 Ch. 305, 312. (2) (1867) L. R. 4 Eq. 9, 12.

ASTBURY J. express or implied extension by us of that time limit would have been a new offer, and as it was not in writing we are protected by the Statute of Frauds: *Goss* v. *Lord Nugent.* (1) Our old offer cannot be used as a memorandum of our supposed new offer and still less of our supposed acceptance of the counter offer. In *Bruner* v. *Moore* (2) Farwell J. expressly pointed out that the Statute of Frauds was not applicable. Neither did it arise in *Hughes* v. *Metropolitan Ry. Co.* (3), on which he relied. The plaintiff in effect says that we are estopped from raising the point. But it requires very strong evidence to deprive us of our legal right to be bound only by a written offer properly accepted, and as we were not in fact aware until after action brought that the acceptance was really out of time, our acts cannot amount to estoppel: *Willmott* v. *Barber* (4); *Palmer* v. *Moore.* (5)

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Even if the acceptance is treated as valid, the important term as to how the balance of the purchase-money was to be secured was left open. There was therefore no concluded contract: *Cooper* v. *Hood.* (6) Our offer required a special acceptance supplying that term: *Boys* v. *Ayerst* (7); *Doe* v. *Pedgriph.* (8) The offer and acceptance must therefore be treated as steps in the negotiations which ultimately failed: *Hussey* v. *Horne-Payne* (9); *Bristol, Cardiff and Swansea Aerated Bread Co.* v. *Maggs.* (10)

Hon. Frank Russell, K.C., in reply. The argument on the Statute of Frauds is based on a fallacy. The statute does not require an agreement in writing. A parol contract is perfectly good so long as there is a sufficient memorandum signed by the party to be charged or his agent. A written offer may be accepted verbally, and if the offer in fact contains the material terms of the parol agreement, that parol agreement may be enforced by the acceptor. Now a parol agreement to extend the time for acceptance of an offer or to treat an out of time acceptance as valid is merely part of the negotiations for the contract. It is

(1) 5 B. & Ad. 58.
(2) [1904] 1 Ch. 305, 312.
(3) (1877) 2 App. Cas. 439.
(4) (1880) 15 Ch. D. 96, 105.
(5) [1900] A. C. 293, 298.
(6) (1858) 26 Beav. 293.
(7) (1822) 6 Madd. 316.
(8) (1830) 4 C. & P. 312.
(9) (1879) 4 App. Cas. 311.
(10) (1890) 44 Ch. D. 616.

not a material term of the actual contract, and need not appear in the memorandum. In *Goss* v. *Lord Nugent* (1) there was a subsequent parol variation of the actual contract. In the present case there was merely an alteration in the negotiations before contract. The statute is therefore inapplicable.

The contract no doubt required the balance of the purchase-money to be secured to the plaintiff's satisfaction, but that did not prevent its being a concluded contract. The plaintiff would have to act reasonably and evidence as to what were reasonable terms would be admissible: *Waring & Gillow, Ld.* v. *Thompson.* (2) The subsequent negotiations on this point do not affect the conclusiveness of the contract: *Bellamy* v. *Debenham.* (3) It was merely necessary to settle this point in time for completion, and the defendants were wholly unjustified in repudiating two months before that date: *Ellis* v. *Rogers.* (4) The stipulation was purely for my benefit, and if the fact that it is still unsettled stands in my way I am entitled and offer to waive it at the Bar: *Hawksley* v. *Outram* (5); *Lloyd* v. *Nowell.* (6) I ask for damages in lieu of specific performance.

Micklem, K.C., in rejoinder. In those cases no question as to the Statute of Frauds was raised. The plaintiff relied on condition (b) and refused our personal security. He cannot now waive a condition he has throughout insisted on.

Cur. adv. vult.

July 30. ASTBURY J. (after stating the facts). The first question is whether there was in fact an acceptance of the defendants' offer.

It is not disputed that as far as this Court is concerned the word "month" must be construed "lunar month": *Bruner* v. *Moore.* (7) The plaintiff, however, contends that the month was intended to run from his actual receipt of the offer. I do not read the offer in that way. The plaintiff then contends that as the offer was merely dated September, 1912, the day of the

(1) 5 B. & Ad. 58.
(2) (1912) 29 Times L. R. 154.
(3) (1890) 45 Ch. D. 481; [1891] 1 Ch. 412.
(4) (1885) 29 Ch. D. 661.
(5) [1892] 3 Ch. 359, 376, 378, 381.
(6) [1895] 2 Ch. 744, 746.
(7) [1904] 1 Ch. 305, 312.

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month being omitted, his option ran to October 28, i.e., a lunar month from the end of September. I cannot accede to this contention, as if the offer had been made early in September this contention would make the period about two lunar months.

The plaintiff next contends that Messrs. Stiles were authorized to receive the acceptance as the defendants' agents and therefore the acceptance dates from October 18, 1912, when it was posted. On the evidence I hold that no previous authority was in fact given to Messrs. Stiles to receive the acceptance, but after their receipt of the acceptance and their covering letter sending on a copy and not the original to the defendants, who did not demand the original, I hold that the defendants ratified their acting as recipients of the acceptance on the defendants' behalf and therefore treated it as posted in due time.

The plaintiff further contends that the defendants are estopped by conduct or implied agreement from now setting up the contention that the acceptance was out of time. The defendant Millington admitted in the box that the first suggestion that the acceptance was too late came from his solicitor after action brought.

In the somewhat similar case of *Bruner* v. *Moore* (1) Farwell J., after holding that the option expired in a lunar month, said, "But although the contract bears this primary meaning, and the subsequent acts of the parties are not admissible in order to alter the meaning, there is nothing to prevent the parties from coming to a subsequent agreement having the effect of extending the period of option, and such agreement need not be in writing (apart from the Statute of Frauds, of which there is no question in the present case), but may be implied from a course of conduct (as in *Const* v. *Harris* (2) and *Pilling* v. *Pilling* (3), the principle of which, 'modus et conventio vincunt legem,' is not confined to partnership cases), and may be the more readily implied where the conduct of the party resisting the implication has induced the other to do work or expend money on the faith of a state of things existing under the supposed new agreement but non-existent under the old, and, even if no such agreement can be

(1) [1904] 1 Ch. 305, 312. (2) (1824) T. & R. 496, 523.
(3) (1865) 3 D. J. & S. 162.

implied, the conduct may be of such a nature as to raise an equity against the party resisting." He referred to *Hughes* v. *Metropolitan Ry. Co.* (1) as establishing this principle.

The defendants contend that no estoppel can be raised from their acts subsequent to the acceptance. They rely on *Willmott* v. *Barber*. (2) In that case Fry J. said: "It requires very strong evidence to induce the Court to deprive a man of his legal right when he has expressly stipulated that he shall be bound only by a written document. It has been said that the acquiescence which will deprive a man of his legal rights must amount to fraud, and in my view that is an abbreviated statement of a very true proposition. A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights. What, then, are the elements or requisites necessary to constitute fraud of that description? In the first place the plaintiff must have made a mistake as to his legal rights. Secondly, the plaintiff must have expended some money or must have done some act (not necessarily upon the defendant's land) on the faith of his mistaken belief. Thirdly, the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff. If he does not know of it he is in the same position as the plaintiff, and the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights. Fourthly, the defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his rights. If he does not, there is nothing which calls upon him to assert his own rights. Lastly, the defendant, the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right. Where all these elements exist, there is fraud of such a nature as will entitle the Court to restrain the possessor of the legal right from exercising it, but, in my judgment, nothing short of this will do."

On the facts of this case and apart from my previous holding that Messrs. Stiles were the defendants' agents I think I am entitled to hold (subject to the question of the Statute of Frauds)

(1) 2 App. Cas. 439. (2) 15 Ch. D. 96, 105.

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that there was an agreement implied by the defendants' conduct and the circumstances of the case either to enlarge the time for acceptance or to treat the actual acceptance as a proper acceptance.

I have now to deal with the question of the Statute of Frauds. The defendants contend that the agreement if any to extend the time for acceptance or to treat the actual acceptance as valid must be in writing under the statute, and that the supposed acceptance being in fact out of time was a counter offer and that no memorandum within the statute of any agreement made by acceptance of that counter offer exists. They further say that the offer and acceptance even if so regarded did not constitute a concluded contract by reason of the later provision for a formal contract being entered into. Now the note or memorandum under s. 4 of the Statute of Frauds must contain the names of the parties, the subject-matter of the contract and its terms, and the consideration, and the mere fact that the parties may have agreed at the time or subsequently to the agreement in question that a more formal document should be prepared is not sufficient to prevent the contract being sued upon, if they in fact intended to bind themselves by a contract the terms of which are contained in the note or memorandum in question signed by the party to be charged or his agent. In *Hickman* v. *Haynes* (1) Lindley J. said that the result of the cases appeared to be that neither a plaintiff nor a defendant could at law avail himself of a parol agreement to vary or enlarge the time for performing "a contract previously entered into in writing," and required so to be by the Statute of Frauds.

It is clear, however, that an offer in writing verbally accepted may be a good note or memorandum within the statute, and when a written instrument contains no date, parol evidence is admissible to shew when it was written and from what date it was intended to operate. Applying these principles I am of opinion that quite apart from the ratification by the defendants in treating Messrs. Stiles as proper recipients of the acceptance posted to them on October 18, 1912, the defendants' conduct shews either a previous agreement to extend the time for

(1) (1875) L. R. 10 C. P. 598, 605.

acceptance or an agreement to treat the letter of that date as an acceptance of their offer. Now s. 4 of the Statute of Frauds only requires a note or memorandum of the agreement referred to in the section, which agreement does not come into existence until the offer and acceptance are complete, and therefore an agreement to extend the time for acceptance, or an agreement that an acceptance, which by reason of its date need not be treated as an acceptance, shall be so treated so as to create a contract, is not an agreement which the statute requires to be evidenced in writing, if the note or memorandum contained in the signed offer is otherwise sufficient. I am also of opinion that Farwell J. in *Bruner* v. *Moore* (1), though mentioning that such a question might be raised, did not decide anything to the contrary. Nor do I think that *Goss* v. *Lord Nugent* (2) or other similar cases decide anything contrary to this view. They merely decide that when a contract falling within the Statute of Frauds is once made, no conduct or verbal waiver can be relied upon to substitute a different term from one appearing in the contract itself.

The remaining question is whether, having regard to the correspondence and acts of the parties, the offer and acceptance in question constituted a completed bargain, or whether they were merely steps in a series of negotiations which did not result in a contract: see *Hussey* v. *Horne-Payne* (3); *Bristol, Cardiff and Swansea Aerated Bread Co.* v. *Maggs.* (4)

It is not suggested that the conditions as to the new lease from Lord Chesham or as to the defendants being permitted to carry on their business or as to the arrangements for the realization of the plaintiff's stock create any difficulty, but the defendants contend that the negotiations as to the security to be given by them for the balance of the purchase-money and the arrangement made as to a draft contract embodying the latest proposals made by them in this connection bring the case within *Hussey* v. *Horne-Payne.* (3)

In my judgment this is not so. The time agreed upon for completion in the original contract was March 24, 1913, when

(1) [1904] 1 Ch. 305, 312.
(2) 5 B. & Ad. 58.
(3) 4 App. Cas. 311.
(4) 44 Ch. D. 616.

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the purchase-money was to be paid as to 250*l.* down and the balance within two years, the balance and interest thereon in the meantime to be secured to the plaintiff's satisfaction. The fact that the parties negotiated beforehand as to what this security should be and arranged ultimately at the defendants' suggestion that the whole purchase-money should be paid in cash on completion, less a deposit of 10 per cent. on the signature of a formal contract so providing, does not in my view free the defendants from their obligation under the original contract in the event of their refusing as they did to abide by their substituted proposal, relating to a term in the contract which they bound themselves to perform, not in accordance with any future agreement to be made, but to the plaintiff's satisfaction, especially as they refused to be bound by their original obligation more than two months before the time for performance arrived and before the plaintiff was at that time given any opportunity of accepting or refusing to be satisfied with such a security as a reasonable man acting honestly might accept.

All the conditions referred to in the offer and acceptance were such as would necessarily be determined one way or another at or prior to the time fixed for completion, and in my judgment both parties meant and intended the offer and acceptance in question to constitute a binding and definite contract and so treated them.

Moreover the provision as to securing the balance of the purchase-money was a term inserted solely in the plaintiff's favour which he has waived at the Bar as I think he is entitled to do if it is necessary under the rule in *Hawksley* v. *Outram.* (1)

The various points of the defence are purely technical and fail, and the plaintiff, who has established the contract and the defendants' breach in respect of which he has suffered damage, is in my judgment entitled to succeed. As the plaintiff does not now ask for specific performance, I direct an inquiry as to damages. The defendants must pay the costs of the action down to and including this order, and there will be liberty to apply.

Solicitors: *Samuel Tonkin; Ernest Henry Tucker.*

(1) [1892] 3 Ch. 359.

G. R. A.

ASTBURY J.
1913
October 16.

In re COOKE'S SETTLEMENT.
TARRY *v.* COOKE.

[1913 C. 1336.]

Settlement—Trust for Sale—Absolute Discretion as to Time of Sale—Difficulty of Realization—Proposed Appropriation in Specie—Settled Share—Unauthorized Investments—Jurisdiction of Court.

Where property is settled on trust for sale as and when the trustees in their absolute discretion think fit, and there is great difficulty in realization, the Court has jurisdiction to sanction an appropriation of the original investments to the shares of the various beneficiaries, including a settled share, although some of the investments appropriated to the settled share are not authorized by the investment clause.

In re Brooks (1897) 76 L. T. 771, followed.

In re Beverly [1901] 1 Ch. 681, 688, distinguished.

ORIGINATING SUMMONS.

By an ante-nuptial settlement dated March 25, 1887, and made between the husband of the first part, the wife of the second part, and the trustees of the third part, thirty-nine leasehold houses subject to various mortgages were assigned by the husband to the trustees upon trust that they should "as and when they or he in their or his absolute discretion shall think fit" sell the said premises and should hold the net proceeds of any such sale upon trust to apply the income during the joint lives of the husband and wife for their benefit as the trustees in their absolute discretion might think fit and upon trust after the death of the wife if she predeceased the husband to pay the income to the husband during his life, but if the husband predeceased the wife in trust to pay the wife an annuity of 200*l.* a year for her life, and subject to the trusts aforesaid the trustees should hold the sale moneys and the income thereof upon trust for the husband's children or issue (already born or thereafter to be born) as he should by deed or will appoint and in default of appointment as therein mentioned.

It was declared that until the leasehold premises should have been sold the trustees should apply the net rents and profits (after payment (inter alia) of the rents reserved by the leases

ASTBURY J. and interest on the mortgages) for the purposes and in manner directed concerning the income of the sale moneys.

1913

COOKE'S SETTLEMENT, *In re.* TARRY *v.* COOKE.

The investment clause authorized investment of the trust funds (inter alia) in leasehold securities "held for a term whereof sixty years at least shall be unexpired at the time of such investment" or in the purchase of similar leaseholds. There was no express power to retain existing investments and there was no express power of appropriation.

The husband had several children by a previous marriage of whom seven, including his son Frederick, were living at the date of the above settlement. He had no children by his second marriage.

The husband died on August 13, 1898, and his wife in 1906.

By his will, dated March 28, 1898, the husband exercised his power of appointment and under that appointment and in the events that happened the trust funds were now held as to one seventh share in trust for Frederick for life and subject thereto in trust for his children (other than children by his present wife) who being male should attain the age of twenty-one years or being female should attain that age or marry, in equal shares, and in default of such children upon the trusts of the remaining shares.

Each of the remaining six shares was held in trust for persons sui juris and absolutely entitled to give a discharge for the same.

Frederick was fifty-six years old and his wife was a few years younger. He had no children.

Since the date of the settlement some of the mortgages had been paid off or reduced partly out of the proceeds of sale of some of the leaseholds and partly out of partial accumulations of the rents and profits authorized by the settlement for that purpose.

The trustees still held thirty-four of the leaseholds which they were unable to sell.

A valuation was obtained which gave the gross value at 29,940*l.*, and deducting the 17,700*l.* mortgages the net value was 12,240*l.* One seventh of this was 1748*l.* 11*s.* 5*d.*

Frederick was desirous that a specific portion of the leaseholds

should be appropriated by the trustees in satisfaction of his settled share, and the other owners were desirous of having their shares transferred to them in specie.

A scheme was prepared under which the following properties were to be appropriated to the settled share.

Description.	Term unexpired.	Gross Value.	Mortgage.	Net Value.
3, Airlie Gardens	66 years	£3150 0 0	£2000	£1150 0 0
36, Hazlitt Road	65 years	260 0 0	nil	260 0 0
18, Drayson Mews	43 years	330 0 0	nil	330 0 0
Cash		8 11 5		8 11 5
		£3748 11 5	£2000	£1748 11 5

On May 14, 1913, the trustees issued this summons for liberty to make the appropriation.

Coote, for the trustees. The proposed appropriation is obviously fair, and is approved by all persons interested. There are eleven houses in Drayson Mews, all with only forty-three years unexpired, and nine of them are incumbered. We have selected an unincumbered house for the settled share. Again the whole settled estate is subject to the 17,700*l.* mortgages and we have appropriated 3, Airlie Gardens subject to a mortgage of 2000*l.* to the settled share. This mortgage is evidently less than one seventh of the total mortgage debt.

There is, however, a remote possibility that Frederick might have children by a future wife, and in their interests I am bound to point out that neither an equity of redemption nor a lease of forty-three years is an authorized investment under the investment clause, and there is therefore a doubt whether the Court has jurisdiction to sanction this appropriation: *In re Beverly.* (1)

Roope Reeve, for Frederick. These leaseholds were all part

(1) [1901] 1 Ch. 681, 688.

ASTBURY J. 1913 COOKE'S SETTLEMENT, *In re.* TARRY *v.* COOKE.

of the property originally settled. The direction to the trustees to sell "as and when they or he in their or his absolute discretion shall think fit" gives the trustees a power to retain the leaseholds until they think fit to sell and while so retained they are authorized investments. The Court has therefore jurisdiction to sanction the appropriation: *In re Brooks* (1), following *Fraser* v. *Murdoch.* (2)

In *In re Beverly* (3) there was no doubt an express power to retain, but the trustees in fact proposed to appropriate strict trust investments to the settled shares, so that the present point did not arise. If therefore the observations of Buckley J. really mean that in respect of settled shares trustees can only appropriate investments authorized by the investment clause and not investments authorized to be retained, they are merely obiter and directly contrary to the decisions in *In re Brooks* (1) and *Fraser* v. *Murdoch.* (2)

P. M. Walters, R. Leigh Ramsbotham, G. R. Blanco White, and *Gerard Sanders,* for the other owners.

ASTBURY J. (after stating the facts). The question is whether I have power to sanction this appropriation in respect of the settled shares.

In *In re Beverly* (4) Buckley J. said: "The trustees of the settled shares can only consent to take—in satisfaction of what is given to them—such investments as are authorized by the instrument which creates the settlement. This will contains certain clauses as to investment, and there cannot, I apprehend, be appropriated to those three ninth shares any investments which do not fall within the scope of the investments allowed by the will."

In that case, however, the trustees only proposed to appropriate assets of a nature authorized by the will or by law as trust investments in satisfaction of the settled shares, so that although there was a power of retainer the present point did not really arise for decision.

(1) 76 L. T. 771.
(2) (1881) 6 App. Cas. 855, 863, 869, 877.
(3) [1901] 1 Ch. 681.
(4) [1901] 1 Ch. 688.

In the present case, having regard to the ages of Frederick and his wife and to the fact that the settled property consists of leaseholds very difficult to realize, and that the trustees have absolute discretion as to the time they shall be sold, I think that the decision of Stirling J. in *In re Brooks* (1) is a sufficient authority to justify me in sanctioning the appropriation, particularly having regard to the special circumstances existing in this case.

In *In re Brooks* (1) there was an immediate trust for sale, but the testator gave his trustees power to retain any part of his personal estate in the investments in which they were at the time of his decease. The trustees retained certain brewery shares which were not authorized investments under the investment clause and appropriated some of them in satisfaction of a daughter's settled legacy and others in part satisfaction of her settled share of residue. Stirling J. held that as the trustees were authorized to retain the brewery shares the appropriation was valid.

In the present case there is no express power to retain, but as the trustees are only to sell "as and when they or he in their or his absolute discretion shall think fit" and are at present justified in holding these leaseholds, I think the same principle is applicable and that I have jurisdiction to sanction this appropriation subject to strict proof of the ages of Frederick and his wife.

Solicitors: *T. Blanco White; Torr & Co.; Hilder, Thompson & Dunn; L. M. Biden.*

(1) 76 L. T. 771.

G. R. A.

C. A.
1912
WARRINGTON J.
Dec. 18.
C. A.
1913
Oct. 21.

In re WITTY.

WRIGHT *v.* ROBINSON.

[1912 W. 1330.]

Will—Construction — Appointment — Excessive Exercise — Contingent Class — Objects—Non-objects—Ascertainment at Future Period.

J. W. by her will gave to her daughter E. R. a power to appoint funds "in favour of all . . . . or any one or more of the child or children or other issue or both of my said daughter E. R. as may be living at her death." E. R. by her will appointed that the funds should be held in trust for her children who should attain twenty-one or marry in equal shares. She then directed the trustees to retain the shares of each of her daughters and pay the income to her for life for her separate use without power of anticipation and after the decease of such daughter in trust for her children or remoter issue (such remoter issue being born in her lifetime) in such manner as she should by deed or will appoint; and in default of appointment for the daughter's children who should attain twenty-one or marry.

J. W. died in 1888. E. R. died in 1911, leaving eight children. One of her daughters, who was born before the death of J. W. and had four children, all born before the death of E. R., was the plaintiff, and she claimed that the settlement of the share appointed to her was void inasmuch as it might apply to non-objects of the power; that the original appointment in her favour was therefore not cut down; and that she took the share absolutely :—

Held (affirming the decision of Warrington J.), that the provisions for a settlement were only void so far as they might apply to non-objects of the power, and that this must be ascertained at the death of the plaintiff. The law on the point was settled by *Sadler* v. *Pratt* (1833) 5 Sim. 632, *Harvey* v. *Stracey* (1852) 1 Drew. 73, and *In re Farncombe's Trusts* (1878) 9 Ch. D. 652, and was no longer open to discussion.

Adjourned Summons.

The following statement of facts is taken from the judgment of Warrington J.

Jane Witty, a widow, who died on September 2, 1888, made her will, dated June 9, 1881, and appointed her daughter Elizabeth Robinson her executrix. She devised all her residuary real and personal estate upon trust to sell and to stand possessed of the proceeds, to pay certain annuities, to invest the sum of 1000*l.*, and as to the residue to pay the income to her daughter Elizabeth Robinson for her life " And after the

decease of my said daughter Elizabeth Robinson . . . . upon such trusts in favour of all . . . . or any one or more of the child or children or other issue or both of my said daughter Elizabeth Robinson as may be living at her death and in such parts shares and proportions and either by way of estate annuity or charge as my said daughter Elizabeth Robinson shall by her last will and testament in writing notwithstanding coverture direct limit or appoint And in default of such direction limitation or appointment and subject thereto upon trust for the child if only one or all the children if more than one of my said daughter Elizabeth Robinson who (either before or after this limitation shall take effect in possession) shall live to attain the age of twenty-one years or who shall die under that age leaving lawful issue living at his or her death or respective deaths in equal shares and proportions as tenants in common and not as joint tenants." That is a power to appoint to all the children and to the issue of Elizabeth Robinson provided as to both children and issue that they are living at her death. Then Elizabeth Robinson, who died on June 3, 1911, leaving eight children, made her will in exercise of the power. She recited the power, and in exercise of it appointed that the funds should be held in trust "for my child if only one or all my children if more than one who being a son or sons shall attain the age of twenty-one years or being a daughter or daughters shall attain that age or be married and if more than one in equal shares." That appointment is undoubtedly good so far; there is no question about it. It does not exceed the limits of the rule against perpetuities, nor does it include non-objects of the power; because as it is an appointment in favour of the children only it must be confined to the children living at her death. But then—and this is what gives rise to such difficulty as there is—she directed that if such child or children or any of them should be a daughter or daughters the trustees were to retain such daughter's share and to stand possessed of each such share upon trust to pay the income to the daughter for her life for her separate use without power of anticipation "And immediately after the decease of my same daughter entitled thereto as aforesaid . . . . as to as well the capital of the said settled fund as the income thenceforth to

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accrue due for the same In trust for all or any of the children and remoter issue of my same daughter . . . . (such remoter issue being born in her lifetime) in such proportions for such interests and generally in such manner as she whether covert or sole shall from time to time by deed with or without power of revocation and new appointment or by her will appoint . . . . And in default of appointment and subject to any partial appointment In trust for the child if only one or all the children if more than one of my same daughter . . . . who either before or after her decease shall being a son or sons attain the age of twenty-one years or being a daughter or daughters attain that age or be married such children if more than one to take in equal shares." One of the daughters of Elizabeth Robinson is the plaintiff, Edith Wright, who was born in the lifetime of the original testatrix and had four children, born before the death of Mrs. Robinson, one of whom has attained twenty-one. She has taken out this summons claiming to be entitled under the will of Jane Witty, by virtue of the appointment made by Mrs. Robinson, to a declaration that she is entitled to her share absolutely, inasmuch as the provisions for the settlement of that share were in excess of the power and invalid.

The summons was heard before Warrington J. on December 18, 1912.

Cave, K.C., and *Maugham*, for the plaintiff.
Vanneck, for the plaintiff's infant children.
W. H. Owen, for the trustees.

WARRINGTON J. stated the facts and continued: Now I have to consider how far this appointment by Elizabeth Robinson is valid or not. In the first place it is quite clear that she had no right or power under the will of Jane Witty to give to her daughter, Mrs. Wright, the power of distributing the fund amongst her issue. It was she and she only who had the power of making that distribution, and she was not authorized to entrust it to Mrs. Wright. The power of appointment therefore which she purports to give to Mrs. Wright is invalid as not being within

her own power. The result of that invalidity is that the power of appointment must be struck out, and then the trust which is attached to Mrs. Wright's share will be a trust for Mrs. Wright for life, for her separate use without power of anticipation, and after her death upon trust for her children attaining twenty-one. The appointment to Mrs. Wright for her life is plainly valid. That there is no question about. The only question is how far the appointment to the children of Mrs. Wright attaining twenty-one is valid. Now Mrs. Wright is still living. Therefore it is possible that there may come into existence children of Mrs. Wright who were not living at the death of Mrs. Robinson on June 3, 1911; in other words, the class who may become entitled as children of Mrs. Wright may include persons who are not objects of the original power. It was at one time suggested that the appointment in favour of the children of Mrs. Wright attaining twenty-one might also be subject to the defect of being too remote within the rule against perpetuities, but it is quite clear that that is not so, inasmuch as Mrs. Wright was in existence at the death of the original testatrix. If this appointment by Mrs. Robinson is read into the will of the original testatrix there will be a limitation to Mrs. Robinson for life, and a limitation to Mrs. Wright for life, followed by a limitation to Mrs. Wright's children who attain twenty-one. That limitation would be perfectly good because Mrs. Wright was in existence at the death of the testatrix into whose will those limitations have to be read. The only objection therefore to the appointment to the children of Mrs. Wright is that it includes persons not objects of the power. Now how far is that an objection to the validity of the appointment? Does it invalidate it altogether or does it only invalidate it so far as it purports to give, and in the result gives, shares to persons who are not objects of the power. It is quite clear on the principle laid down by Hall V.-C. in *In re Farncombe's Trusts* (1) that it is good so far as it gives shares to those who are within the objects, and it only fails so far as, if at all, it may purport to confer shares upon persons who are not objects. The whole class can be ascertained within the limits against perpetuities. To put a concrete case, supposing there should be two more

(1) 9 Ch. D. 652.

C. A. 1913 WITTY, *In re.* WRIGHT *v.* ROBINSON. Warrington J.

children—there are at present four—of Mrs. Wright subsequently coming into existence, and supposing all six children should attain twenty-one, there will then be six persons who would constitute the class mentioned in the will of Mrs. Robinson. Of those six four are objects of the power and two only will not be objects of the power. There is no reason whatever why the four who are objects of the power should not take their shares; they cannot take more than four sixths, because that is all the testatrix intended them to have; but there is no reason why they should not take those shares, leaving the other two shares which the testatrix has given to persons who are not objects to go as in default of appointment. That is clearly the result of the decision in *In re Farncombe's Trusts*. (1) The facts there were these: "The donee of a power to appoint a fund in favour of her own issue, 'such issue to be born before any such appointment,' by deed, after reciting the power and her desire to exercise it, and the state of her family, appointed the fund to her daughter for life, and after the daughter's death to the daughter's children in equal shares on their respectively attaining twenty-one." That is exactly like the present case, because that appointment might include persons who might come into existence after the date of the appointment, and were, therefore, not objects of the power. Then it was held, "first, that issue in existence at the date of the deed of appointment were the only objects of the power. Secondly, that upon the construction of the deed the intention of the appointor was to include non-objects, i.e., issue born after that date. Thirdly, that the appointment was not thereby bad in toto; but that, fourthly, the share of each object would be determined by the total number of objects and non-objects who should fall within the class in whose favour the appointment purported to be made." That seems to me to cover the present case. It is plain that there must be at least one person who would take the share because one of the children of Mrs. Wright has already attained twenty-one. I think, therefore, that so far as the construction of the will is concerned I cannot make the declaration asked for by the summons, namely, that the plaintiff, Mrs. Wright, is entitled to her share absolutely.

(1) 9 Ch. D. 652.

[His Lordship made a declaration "that the appointment by will of the said Elizabeth Robinson of the life estate to the plaintiff Edith Wright is a valid exercise of the power contained in the said will of the testatrix Jane Witty, and that the share so appointed to the said Edith Wright for life will on her death be divisible into so many shares as there are children of the said Edith Wright who shall have attained or shall thereafter attain twenty-one, and that each of such children who was living at the death of the said Elizabeth Robinson will be entitled to one such share, and that the remaining shares, if any, are well appointed to the said Edith Wright."]

W. I. C.

C. A.

The plaintiff appealed. The appeal was heard on October 21, 1913.

Cave, K.C., and *Maugham*, for the appellant. The appointment by Mrs. Robinson to the plaintiff for life is valid, but the subsequent provisions in favour of the plaintiff's children may include persons who were not living at the death of Mrs. Robinson and are not objects of the power, and those provisions are bad. The result is that the original absolute gift to the plaintiff takes effect, and she is entitled to the whole of that share. The Court will have regard to the state of things when the appointment was made, and the shares cannot be severed in the manner suggested by Warrington J. It is true that the learned judge followed *In re Farncombe's Trusts* (1), in which Hall V.-C. relied on the decision of Kindersley V.-C. in *Harvey* v. *Stracey* (2) and of Shadwell V.-C. in *Sadler* v. *Pratt.* (3) But those decisions have never been before the Court of Appeal, and we ask your Lordships to disregard them. *In re Farncombe's Trusts* (1) has not been cited in any case reported in the *Law Reports.* Gifts to classes are not in the same position as gifts to individuals. If any members of the class may be beyond the limits of perpetuity the whole gift is void: *Leake* v. *Robinson.* (4) The principle in cases of remoteness has always been to look at

(1) 9 Ch. D. 652.
(2) 1 Drew. 73.
(3) 5 Sim. 632.
(4) (1817) 2 Mer. 363, 390.

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the state of things as it was at the testator's death: *Pearks* v. *Moseley.* (1) An excessive appointment is void in toto, not merely for the excess: *In re Brown's Trust* (2); *Churchill* v. *Churchill.* (3) The question of remoteness does not arise here, for the plaintiff was born in the lifetime of Mrs. Witty, but the same rule applies. If the Court waits till the class is closed it may be construing the will contrary to the wishes of the testatrix.

[COZENS-HARDY M.R. referred to *In re Coulman.* (4) The decision in *Harvey* v. *Stracey* (5) is cited with approval in Sugden on Powers, 8th ed. pp. 507, 517.]

The Court will not hold that Lord St. Leonards approved of a decision merely because he cited it without comment.

Vanneck, for the plaintiff's infant children, and *W. H. Owen*, for the trustees, were not called upon to argue.

COZENS-HARDY M.R. This is an appeal from a decision of Warrington J. raising a question as to the validity of the exercise of a power of appointment under circumstances which I do not propose to discuss in detail, and for this simple reason. Sixty years ago, in the case of *Harvey* v. *Stracey* (5), the very point was raised before a very great judge in matters of this kind, Kindersley V.-C., who gave a reasoned and most learned judgment deciding this very point; and again eighty years ago the same point was decided in the case of *Sadler* v. *Pratt.* (6) Also Lord St. Leonards in his book on Powers in 1861 cites *Harvey* v. *Stracey* (5) without any indication of doubt that it was perfectly good law; and thirty-five years ago Hall V.-C., who was also in this branch of the law a judge of the highest authority, in *In re Farncombe's Trusts* (7) treated the matter as quite clear, founding himself partly upon *Harvey* v. *Stracey* (5) and partly also upon *Sadler* v. *Pratt.* (6) I think it would be altogether wrong for us to disturb long settled law laid down on such a point as this, or to say that the rule which has been in force for so long in cases of remoteness ought to be applied to a case of this kind.

(1) (1880) 5 App. Cas. 714, 722.
(2) (1865) L. R. 1 Eq. 74.
(3) (1867) L. R. 5 Eq. 44.
(4) (1885) 30 Ch. D. 186.
(5) 1 Drew. 73.
(6) 5 Sim. 632.
(7) 9 Ch. D. 652.

The principle seems to be to wait and see; to take the appointment as being exercised at the moment of distribution and ascertain then whether the appointment is wholly to persons within the class capable of taking, or whether it is partly to persons who are in the class and partly to persons outside it. If it is in equal shares between persons within the class and persons out of the class there is a pro rata distribution. Warrington J. has held here that in the event of there being at the time of the distribution certain persons not objects of power to whom shares are given, then the principle of *Lassence* v. *Tierney* (1) is applied, and the original appointment is quoad those shares cut down. The result is that you wait till the period of distribution to see whether there are children within the class to take, and to the extent to which they are objects of the power they will take whatever is given. So far as they are non-objects of the power the mother will take.

I think it would be very wrong for us to entertain any doubt whatever on a matter which has in my view been settled for at least sixty years, and settled beyond all question.

The appeal must be dismissed with costs.

SWINFEN EADY L.J. I agree. At present there is an appointment by will to take effect at a future period, that is to say on the death of Mrs. Wright, and it has been argued that, as when that period arrives there may be in existence persons who are not objects of the power, therefore the appointment to Mrs. Wright's children is wholly void. At the present time there are children living of Mrs. Wright, and it may be that when the gift takes effect there will only be persons objects of the power entitled to take, but still within the language of the appointment there may be persons not objects of the power. Now no question of remoteness arises. In my opinion the law on this case has been settled for many years. In the case of *Sadler* v. *Pratt* (2), some eighty years ago, and the case of *Harvey* v. *Stracey* (3) these matters were decided, and Hall V.-C. dealt with a similar point. In *In re Farncombe's Trusts* (4) he

(1) (1849) 1 Mac. & G. 551.
(2) 5 Sim. 632.
(3) 1 Drew. 73.
(4) 9 Ch. D. 652.

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referred to these two cases with approval, and he dealt with the matter also upon principle, and referring to these two cases he says that effect is to be given to the appointment in favour of such of the persons as might ultimately be objects of the power, and he states that the law is beyond doubt. In my opinion after that weighty authority it would be quite wrong for this Court to take a different view, or to consider that the matter was still open for further discussion.

PHILLIMORE L.J. I agree. I do not think it necessary to add anything.

Appeal dismissed.

Solicitors: *Percy Short; Davenport, Cunliffe & Blake, for Gale & Easton, Hull.*

H. C. R.

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In re PEARCE.

ALLIANCE ASSURANCE COMPANY *v.* FRANCIS.

[1912 P. 724.]

Will—Construction—Gift to "Children"—Exclusion of Illegitimate Children.

A testatrix by her will dated in 1911 gave the residue of her property in trust for her brother F. during his life, and after his death in trust for "all or any the children or child of" F. living at the death of the survivor of testatrix and F., "and the children or child then living of any deceased child of his who, whether children or grandchildren, being male attain the age of twenty-one years or being female attain that age or marry."

At the dates of the will and the testatrix's death respectively F. had six illegitimate children living (who had been borne to him by K., to whom he was reputed to be married and who died in 1900), and two legitimate children by his marriage in 1904 with S. K. was throughout supposed to be and was accepted as F.'s wife in the society in which they moved; her six children were received as legitimate children; and the testatrix knew them all and was fond of some of them. The testatrix and F. both died in 1911:—

Held, that only the two legitimate children took under the gift.

In re Brown (1890) 63 L. T. 159, followed.

In re Du Bochet [1901] 2 Ch. 441, not followed.

MRS. LAURA THERESA PEARCE by her will, dated January 3, 1911,

appointed the Alliance Assurance Company, Limited, to be her sole executor and trustee, and gave the residue of her real and personal estate to the company upon trust to pay the income to her brother Walter William Francis during his life, and after his death to stand possessed of the corpus and income "In trust for all or any the children or child of my said brother Walter William Francis living at the death of the survivor of myself and my said brother and the children or child then living of any deceased child of his who, whether children or grandchildren, being male attain the age of twenty-one years or being female attain that age or marry, if more than one as tenants in common in equal shares, but so that the children of any deceased child of his shall take equally between them as tenants in common only the share which their parent would have taken had he or she survived me and my said brother and attained a vested interest."

Testatrix died on October 16, 1911, and her brother, W. W. Francis, died on October 26, 1911.

W. W. Francis was a commercial traveller who down to 1884 or 1885 lived in England, but some time before September, 1885, he went to Glasgow and there lived until after his marriage to Rachel Penden Simpson, below mentioned.

He was reputed to be married to Harriet King, by whom he had seven children, six of whom survived him. Harriet King died on August 26, 1900. The first of these children was born in 1875.

W. W. Francis on January 13, 1904, married Rachel Penden Simpson, who survived him. By her he had two children only, one of whom was born on June 15, 1905, and the other on July 28, 1906.

The Alliance Assurance Company, Limited, took out an originating summons against the eldest child of Harriet King and the two children of the marriage with R. P. Simpson for the determination of the question whether the children of W. W. Francis by Harriet King living at the death of the testatrix and the children then living of any such child or children as were then dead were entitled to share in the residuary estate of the testatrix along with the children of W. W. Francis by his wife, R. P. Francis.

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An order made on June 28, 1912, directed an inquiry what children, if any, of W. W. Francis were living at the death of the survivor of the testatrix and W. W. Francis, and whether there were then living any children or child of any deceased child.

The Master by his certificate found that the children of Harriet King were illegitimate and that the only legitimate children were the two children of the marriage with R. P. Simpson. The Court found on the evidence that Harriet King was throughout supposed to be and was accepted as the wife of W. W. Francis in the society in which they moved, that the six children were received as their legitimate children, and that the testatrix knew all of them and was fond of some of them. The question subsequently argued was whether she had sufficiently expressed in her will that she intended to make provision for the six children of Harriet King under the title of "children" of W. W. Francis.

A. Grant, K.C., and *P. F. Stokes*, for the plaintiff company.

Romer, K.C., and *Wright Taylor*, for the two legitimate children. The children of Harriet King do not take under the will. It is a strongly established rule of construction that a gift to children means legitimate children only, unless it appears from the context or from circumstances that illegitimate children must have been intended: Hawkins on Wills, 1st ed. p. 80, citing *Wilkinson* v. *Adam.* (1) The present case falls within the general rule, and not within the exceptions stated in Hawkins on Wills, 1st ed. pp. 81 and 82.

Since that book was written there have been several decisions, some of the House of Lords, on the subject. In *Hill* v. *Crook* (2) it was held that there was a sufficient designation of the illegitimate children as the intended objects of the testator's bounty, but Lord Cairns shews (3) that the testator's knowledge of the state of the family, and the habit of the testator with regard to the treatment of the children, are not sufficient if the will merely refers to the children. In *Dorin* v. *Dorin* (4) the testator had two illegitimate children by a woman before he married her, and

(1) (1812) 1 V. & B. 422.
(2) (1873) L. R. 6 H. L. 265.
(3) L. R. 6 H. L. 284.
(4) (1875) L. R. 7 H. L. 568.

the day after their marriage he made a will in which, after leaving her his property for life, he gave her power to direct the disposal of the property "amongst our children," by will. There were no children of the marriage, but the House of Lords held that "children" only included legitimate children. The decision of Malins V.-C. in *Ellis* v. *Houstoun* (1) is also against the inclusion of the illegitimate children, as is also that of the Court of Appeal in *In re Fish.* (2)

In *In re Brown* (3) the facts were very like those of the present case. A gift was made by will to a niece for life and after the death of herself and her husband to the children of the niece. She and her husband had eight children at the date of the will, but they were all born before the marriage. The testatrix took great interest in the children, but thought they were legitimate. North J. held that they were not entitled to the fund.

Counsel for the illegitimate children will rely on the decision of Joyce J. in *In re Du Bochet* (4); but *In re Brown* (3) does not appear to have been cited in that case. [They also referred to *Holt* v. *Sindrey* (5) and Hawkins on Wills, 2nd ed. pp. 106—113.]

Martelli, K.C., and *E. F. Ball*, for the first defendant, one of the illegitimate children. Upon the facts proved and admitted it is evident that the testatrix meant the word "children" to include both legitimate and illegitimate children. The facts in *In re Du Bochet* (4) are on all fours with those of the present case. The decision of Joyce J. in that case was founded on *Holt* v. *Sindrey.* (6) Those cases and the observations of Lord Cairns in *Hill* v. *Crook* (7) and of Mellish L.J. in *Crook* v. *Hill* (8) shew that there is no rule that legitimate and illegitimate children cannot take together as a class. The speech of Lord Chelmsford in *Hill* v. *Crook* (9) is strongly in favour of the contention that the word "children" in this case includes

(1) (1878) 10 Ch. D. 236.
(2) [1894] 2 Ch. 83.
(3) 63 L. T. 159.
(4) [1901] 2 Ch. 441.
(5) (1868) L. R. 7 Eq. 170; 38 L. J. (Ch.) 126.
(6) L. R. 7 Eq. 170.
(7) L. R. 6 H. L. 265, 283.
(8) (1871) L. R. 6 Ch. 311, 318.
(9) L. R. 6 H. L. 265, 276, 277.

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illegitimate children born before the date of the will. [They also referred to Jarman on Wills, 6th ed. p. 1778, and *In re Loveland.* (1)]

SARGANT J. This is an application raising the vexed question how far illegitimate children can share under a gift to children. The will of the testatrix is dated January 3, 1911, and by the residuary gift in that will, the only part which I need mention, she gave her residue to her brother Walter William Francis during his life, and after the death of the said Walter William Francis "In trust for all or any the children or child of my said brother Walter William Francis living at the death of the survivor of myself and my said brother and the children or child then living of any deceased child of his who whether children or grandchildren being male attain the age of twenty-one years or being female attain that age or marry if more than one as tenants in common in equal shares but so that the children of any deceased child of his shall take equally between them as tenants in common only the share which their parent would have taken had he or she survived me and my said brother and attained a vested interest." The testatrix died on October 16, 1911, at Tunbridge Wells, and her brother Walter William Francis died some ten days after, namely, on October 26, 1911. The value of the estate is some 45,000*l.*

Now I must mention the facts as to the brother and his family. Those are to be found in an affidavit of Mr. Ponsonby made on behalf of the trustees, and the material paragraphs are paragraphs 6, 7, and 8. Paragraph 6 is: "The said Walter William Francis was a commercial traveller. Down to 1884 or 1885 he lived in England but some time before September 1885 he went to Glasgow where he continued to live until his marriage to Rachel Penden Simpson hereinafter mentioned. (7.) I have caused enquiries to be made as to the children of the said Walter William Francis and according to the best of my information and belief he was married or reputed to have been married twice only, namely, (1.) to Harriet King who died on August 26 1900 and by whom he had or was reputed to have had seven

(1) [1906] 1 Ch. 542.

children and no more of whom six only survived him "— then the children are set out—" and (2.) to Rachel Penden Simpson to whom he was married on January 13 1904 who survived him and by whom he had two children and no more both of whom survived him, namely "—then the two infant defendants are mentioned, one having been born on June 15, 1905, and the other on July 28, 1906.

In that state of things an originating summons was issued to determine whether the children whom the tenant for life had had by Harriet King were entitled to share, and on that coming before Parker J., he directed, by an order of June 28, 1912, " An enquiry what children if any of the testatrix's brother Walter William Francis were living at the death of the survivor of the testatrix and the said Walter William Francis and whether there were then living any children or child of any deceased child." On that inquiry a certificate has been made by the Master and he has found that the six children of the earlier union were illegitimate, and that the only two legitimate children were the two children of tender age who were the fruit of the second union.

On the inquiry and on the original hearing of the summons certain affidavits were filed and the facts are fairly plain. I think it is clear that Harriet King was throughout supposed to be and was accepted in the society in which they moved as the wife of W. W. Francis, and that the six children were received as their legitimate children. The testatrix knew all of them and was fond of some of them, and there is a very strong probability amounting almost to certainty, on the mere facts alone, that she intended to make provision for them by her will under the title of children of W. W. Francis. The question is whether she has expressed or sufficiently indicated that intention in her will. I am forced with the greatest regret to say she has not.

The rule is quite clearly stated in Mr. Vaughan Hawkins' book on Wills at p. 80, where he says this : " It is a strongly established rule of construction, aided by the policy of the law, that— Rule. A gift to children means *legitimate* children only, unless it appears, from the context or from circumstances, that illegitimate

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children must have been intended. (*Wilkinson* v. *Adam.* (1)) The same rule applies to gifts to sons, issue, and terms of relationship generally. (*Ib.*)" Then he quotes from Lord Eldon in *Wilkinson* v. *Adam* (1) the following passage: "The rule cannot be stated too broadly, that the description 'child,' 'son,' 'issue,' every word of that species, must be taken prima facie to mean legitimate child, son, or issue: but the true question here is, whether it appears by what we call sufficient description, or necessary implication, that the testator did mean these illegitimate children. . . . The question therefore comes round to this; whether upon the contents of this will it is possible to say, he could mean at the time of making that will any but illegitimate children." Then in the text-book I have referred to there are two exceptions stated, and two exceptions only, to that rule, first the exception where the gift is to the children of a person dead at the date of the will and who had only illegitimate children known to the testator to be illegitimate—there the word "children" has to be satisfied by applying it to the illegitimate children—and secondly an exception which is thus stated by Mr. Vaughan Hawkins (p. 83): "Even where the gift is to the children of a living person, the context may be sufficiently strong to show that particular illegitimate children were intended to take under the gift, as personæ designatæ."

Now the leading cases on the subject are cases which were decided after that book was written and they are *Hill* v. *Crook* (2) and *Dorin* v. *Dorin.* (3) In *Hill* v. *Crook* (2) the most important judgment or speech is that of Lord Cairns. He says (4): "But there are two classes of cases in which that prima facie interpretation is departed from. One class of cases is where it is impossible from the circumstances of the parties that any legitimate children could take under the bequest. A familiar example of that might be given in this way:—Suppose there is a bequest 'to the children of my daughter Jane,' Jane being dead, and having left illegitimate children, but having left no legitimate children. There, inasmuch as the testator must be taken to have known the state of his family,

(1) 1 V. & B. 422, 462, 468.
(2) L. R. 6 H. L. 265.
(3) L. R. 7 H. L. 568.
(4) L. R. 6 H. L. 282, 283, 284.

and must be taken to have intended to benefit some children of his daughter Jane, and inasmuch as she had no children who could be benefited except illegitimate children, rather than that the bequest should fail altogether the Courts will hold that those illegitimate children are intended, and they will take under the term 'children.' Having referred to that class of cases, I may put them altogether aside; for your Lordships will observe that that class of cases can have no bearing upon the present case, because here, as was truly said, there was no reason why legitimate children might not take under the bequest of this will. The other class of cases is of this kind. Where there is upon the face of the will itself, and upon a just and proper construction and interpretation of the words used in it, an expression of the intention of the testator to use the term 'children' not merely according to its prima facie meaning of legitimate children, but according to a meaning which will apply to, and which will include, illegitimate children. I might give again a familiar illustration of that class of cases by the supposition of a bequest upon which, I presume, there would be no argument. Suppose that a testator were to say in his will, 'being aware that my daughter, who is now married to her husband, had before her marriage children by the same person, who in law are illegitimate children, and it being my intention to provide for all the children of my daughter, I give funds to trustees upon trust for her for life, and after her death to divide the funds among the children of my said daughter.' I apprehend that no person reading a bequest of that kind could hesitate to say that the testator had shewn upon the face of his will, by the words which he had used, his intention, in a way that could not be mistaken, to use the generic term 'children' so as to include illegitimate children along with legitimate children."

Lord Cairns then stated the special facts of the case before him and on the basis of those facts put a hypothetical case in regard to the language of the will which is of the utmost importance to the case which I have to decide. He says: "In the first place, in order to interpret the words of the will, it is always not only allowable, but it is the duty of the Court to obtain, the knowledge which the testator had of the state of his family. I find this

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statement with regard to the state of the testator's family admitted by the demurrer to this bill: 'John Crook had formerly been married to Sarah Ann, one of the daughters of the said testator, and the said Sarah Ann having died in the year 1851, the said John Crook in the year 1854, with the full knowledge of the said testator, went through the ceremony of marriage with the said Mary, another daughter of the said testator, and who is in his said will referred to as "Mary the wife of the said John Crook," the said union of the said John Crook and Mary Crook was always looked upon by and treated by the said testator as an existing marriage. Two children of the said Mary Crook were born after her said marriage, and during the lifetime of the testator, that is to say, the plaintiff, Alice Sarah Crook, who was born on the 4th day of November, 1854, and the plaintiff Ernest William Crook, who was born on the 21st of July, 1858. The testator was in the habit of constant and affectionate intercourse with his said daughter Mary Crook and the said John Crook, and always recognised and treated the said John Crook as his son-in-law, and always recognised and treated the plaintiffs as his grandchildren.' Now I may say that, in my opinion, if the matter had stopped there, if your Lordships had nothing more than this admitted statement of the state of the family and the habit of the testator with regard to the treatment of his grandchildren, that would, in my opinion, not have been sufficient. If, even with that statement, you found in the will merely a reference to the children of his daughter Mary, it would not, in my opinion, have been sufficient to refer to this statement of the fact with regard to the family, to entitle you to enlarge the term 'children' so as to include illegitimate children." And then Lord Cairns passes from the hypothesis he had put and deals with the particular language of that particular will and says there is enough on that particular language to raise the presumption of intention on the face of the will that the testator meant to include illegitimate children.

Now certain observations of Lord Chelmsford (1) have been very properly pressed on me by Mr. Martelli. He first of all cites what Lord Eldon said in *Wilkinson* v. *Adam* (2): "In

(1) L. R. 6 H. L. 276, 277. (2) 1 V. & B. 422.

construing a will, conjecture must not be taken for implication, but necessary implication means, not natural necessity, but so strong a probability of intention that an intention contrary to that which is imputed to the testator cannot be supposed." And then he says this himself: "Strong observations were made upon the words 'natural necessity,' which were said to be unintelligible. They are, perhaps, not happily chosen, but I understand them to mean that the intention need not be expressed in language which is necessarily susceptible of only one interpretation, but that it is sufficient if it is indicated in a way that excludes the probability of an opposite intention having existed in the mind of the testator. In construing a will, it has been frequently said that the Court should place itself as fully as possible in the situation of the testator, and guide its construction of his intention in some degree by the light of the knowledge thus acquired." But I think those observations really refer to probability to be inferred not merely from the surrounding facts but from indications on the face of the will. I understand them to mean that the intention need not be expressed in language which is necessarily susceptible of only one interpretation, but that it will be sufficient if you have such an expression of intention in the language of the will as when applied to the facts of the case to amount to almost a practical certainty that the testator was referring to illegitimate children. And on pp. 278 and 279 there are observations by him, which I need not further refer to, which point in that direction also.

There are some other observations by Lord Colonsay which follow very closely the remarks of Lord Cairns. He says this (1): "The question we have to decide is, whether the testator has sufficiently indicated his purpose that the children of the union of his daughter Mary and John Crook were to take under the trust created by his will. I am of opinion that he has. He begins by describing John Crook as 'his son-in-law,' . . . . " The learned judge then mentions other indications to the same effect and then he says this: "Now looking to the structure of that part of his will which contains the bequests to his daughter and her children, and seeing plainly the current of thought and

(1) L. R. 6 H. L. 280.

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intention by which he was actuated, it is clear to me that in regard to the distribution of his estate, which was the real purpose of his will, he intended that these children should participate and be dealt with as if they were legitimate." So that he founded his judgment absolutely and entirely upon the particular intention to be gathered from the actual expressions in the will.

But if there were any doubt left as to the true meaning of the decision in *Hill* v. *Crook* (1) it was entirely cleared up by a case which followed shortly afterwards, *Dorin* v. *Dorin* (2), which was about as hard a case as it is possible to conceive, because it was a case where the testator had married a lady by whom he had had two children previously, and made a will the day after his marriage leaving the property to his children by her. He never had any children by her afterwards, and it was held that the previously born children could not take. Lord Cairns says: "My Lords, I adhere to the conclusions which I was able, upon the consideration of the case of *Hill* v. *Crook* (1), to draw from the various authorities there cited. According to those conclusions, I feel myself bound to ask whether, with a knowledge of the position, and what are called the surrounding circumstances, at the time the testator made his will, there is anything upon the face of the will which enables me to say that those who in the eye of the law were not his children, were intended by him to take under the general expressions used in his will, namely, 'I leave her' (meaning his wife) 'at liberty to direct the disposal of the property amongst our children, by will, at her death, in such manner as she shall think fit, and should she make no will I desire that the property existing at her death shall be divided as far as it may be practicable to do so equally between my children by her.' The testator who used these expressions had been married to the wife of whom he speaks the day before he made his will. He had had two children by her, who at that time were of the age, as I gather, the elder of about eight or nine, and the younger nearly three. They were clearly illegitimate children. I ventured to put to the learned counsel who argued the case at the Bar, this

(1) L. R. 6 H. L. 265. (2) L. R. 7 H. L. 568.

question: supposing that it had been in the mind of the testator, and we do not know and cannot know what his mind was except by his own expressions—supposing it had been in his mind not to take any notice of these children in his will, or to make any provision for them by his will, but to make a provision for them in some other way, and to use his will to designate merely his wife and any legitimate children who might be afterwards born, would not every word in the will be satisfied? Undoubtedly every word would be satisfied. Therefore, if that is so, you are not able to say that the will upon the face of it constrains you to depart from what is the ordinary and prima facie legal meaning of the word 'children.' When the case is considered that is the true result. There is no case whatever which would enable us, in the interpretation of this will, to strain the word 'children' beyond its ordinary legal meaning."

I ought now to refer to one or two of these cases which followed. *Ellis* v. *Houstoun* (1) is a decision against the inclusion of the illegitimate children. That is a decision of Malins V.-C., who was a most benevolent judge as well as a sound lawyer. He felt constrained, with extreme regret, to hold that the illegitimate children did not take. After that the next case I need mention is a case of *In re Fish* (2), a decision of the Court of Appeal. There the residuary estate had been given by a testator to his niece E. W. Neither he nor his wife had any niece; but his wife had a legitimate grandniece and an illegitimate grandniece both named E. W. The illegitimate grandniece tendered evidence to shew that she was the person indicated by the testator. That evidence was rejected on the ground, as I gather from the judgment, that a testator might describe his wife's grandniece as his niece, and that being so the words aptly and completely described the legitimate niece and did not completely describe the illegitimate niece, and, therefore, there was no equivocation and extrinsic evidence could not be brought in for the purpose of determining who was meant.

Then came the case of *In re Brown.* (3) That is a decision of North J., and it is admitted by counsel for the illegitimate

(1) 10 Ch. D. 236. (2) [1894] 2 Ch. 83.
(3) 63 L. T. 159.

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children here to be absolutely on all fours with the present case. The head-note is: "A testatrix by her will dated in 1867 gave to her executors a sum of stock upon trust to pay the income to her niece Martha M. (wife of Walter John M.) during her life, and after her death to pay the same income to the said Walter John M. during his life, and after the death of the survivor, to divide the stock between the children of her said niece, the same to be vested interests at twenty-one. At the date of the will Martha M. had eight children. She had for many years prior to the date of the will lived with Walter John M. as his wife, and all the children were born before her marriage with him, which took place shortly before the date of the will. The testatrix always believed that her niece and her husband were married before they commenced living together, and that the children were legitimate. She always took great interest in the children, and paid their school and other expenses. At the date of the will Martha M. was fifty years of age, and she had not had a child for six years." Nevertheless North J. was constrained to hold that those children could not take.

Now I come to the only case to the contrary, so far as I can see, a case which has caused me very great doubt and difficulty, *In re Du Bochet* (1), before Joyce J. I think I should say that the main point decided in that case and that to which the learned judge specially addressed his mind was whether an after-born illegitimate child could take, and it is also to be noticed that in that case *In re Brown* (2) was not cited. I will read the head-note: "A testatrix bequeathed her residuary estate in trust equally for all such of the children being daughters of her nephew R., her niece Mrs. A., and her niece Mrs. H., as should attain twenty-one or marry under that age, each child to be paid her share on attaining that age or marrying under it. At the date of the will and of the testatrix's death the nephew R. was cohabiting with a woman reputed to be his wife, and there was issue of this union three daughters, two born before the date of the will, and one born after the date of the will, but before the date of the death. The nieces had several daughters, one of whom had attained twenty-one at the date of

(1) [1901] 2 Ch. 441. (2) 63 L. T. 159.

the testatrix's death. The testatrix had always spoken of R.'s reputed wife as his wife, and the three daughters as their children, there being no suspicion of illegitimacy. Upon the arrival of the time for the final distribution of the estate it was discovered that R. did not marry his reputed wife until some years after the death of the testatrix:—Held, that the two children born before the date of the will were entitled to participate, but that the child born afterwards was not entitled." The judgment in *In re Du Bochet* (1) was a reserved judgment, and one of the cases which was very much relied on, and which the learned judge followed, was *Holt* v. *Sindrey*. (2) He took that as being a case on all fours with the case he had to decide, but he pointed out that the head-note of *Holt* v. *Sindrey* in the *Law Reports* was not quite accurate, and he took the head-note from the *Law Journal*, which I will read from his judgment (3): "A testator bequeathed a fund to trustees upon trust during the life of his daughter M., the wife of J. L., for her separate use, and after her death upon trust for 'all and every the child and children of his said daughter M. L. begotten or to be begotten.' The testator was not aware when he made his will that his daughter M. L. was not the wife of J. L.; and that four children then borne by her to J. L. were illegitimate. The testator had always treated his daughter M. and J. L. and their children as if the parents had been married and their children lawfully begotten. After the date of the will M. L. bore three other children to J. L. which were also illegitimate. M. L. died without having had any other children. It was held that the four children born before the date of the will were, although illegitimate, sufficiently described in the will as legatees, and that they were entitled to the fund."

I have looked very carefully at the facts in the case of *Holt* v. *Sindrey* (2) and they entirely accord with that note, and it seems to me to be a case precisely like *Hill* v. *Crook* (4), namely, a case in which on the face of the will, and from the expressions used, you could gather that the testator intended to describe and denote these existing illegitimate children as

(1) [1901] 2 Ch. 441.
(2) L. R. 7 Eq. 170; 38 L. J. (Ch.) 126.
(3) [1901] 2 Ch. 445.
(4) L. R. 6 H. L. 265.

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children. That is exactly what was said in this head-note. "They were sufficiently described in the will as legatees," or, as put in the passage from Mr. Vaughan Hawkins' book, they were practically made personæ designatæ by the expressions in the will. In that case there was the all-important point which was not present in *In re Du Bochet* (1) and is not present here, that there was a gift in separate terms to the existing children as well as to future children.

I am really in this difficulty, that I have to choose between two decisions which are absolutely contrary to each other and each of which is on all fours with the present case, the case of *In re Brown* (2) and the case of *In re Du Bochet* (1), and in those circumstances I must follow the case which seems to me most in accordance with principle and authority, and I think that is the case of *In re Brown.* (2)

On the general question of construction I may refer to the case of *Higgins* v. *Dawson* (3), which was a decision as regards the meaning of the word "residue." The principle given effect to there that the proper legal meaning of words cannot be departed from on mere conjecture, however probable, is in my judgment equally applicable here.

Finally I should notice two arguments which have been addressed to me with regard to the particular circumstances in this case, and one other argument. The first of those two is that, having regard to the tender age of the two legitimate children at the date of the will, the gift to any children of a deceased child points to an intention to include in the gift persons who were mature, such as the first family. But since the gift is not to take effect until the death of the survivor of the testatrix and her brother, I do not think that any great weight can be attached to this, at any rate not sufficient to alter the general rule. The second is that the testatrix believed that the first union was a legal one and that the first family were legitimate. That is a circumstance which has occurred in a good many of the cases, but so far as it goes I think that it tends rather against the inclusion of the illegitimate children than in favour of the

(1) [1901] 2 Ch. 441. (2) 63 L. T. 159.
(3) [1902] A. C. 1.

inclusion. The fact that a testator did not know of the illegitimacy prevents the conclusion that the testator is putting any artificial meaning on the word "children": such a testator is not giving to personæ designatæ, but to a described class amongst whom the illegitimate children unfortunately are not included through circumstances not known to the testator.

The other argument I have been pressed with is that there has lately been a growing tendency to include in gifts of this kind illegitimate children, and that therefore I ought to go beyond the decision in *Hill* v. *Crook* (1), and the decision in *Dorin* v. *Dorin* (2), and to prefer *In re Du Bochet* (3) to *In re Brown*. (4) If I could find any change of principle that has been adopted by the Courts recently, I should be glad to follow it. I wish I could come to a conclusion other than that to which I am coming, but the principle seems to me to have been precisely the same throughout, and, having regard to the broad rule of interpretation laid down in *Hill* v. *Crook* (1) and *Dorin* v. *Dorin* (2), and repeatedly followed, I cannot come to any other conclusion than that which I have mentioned. That being so, I must declare that the residue goes to the two legitimate children.

Solicitors for plaintiffs: *Crawley, Arnold & Co.*

Solicitors for defendants: *Peacock & Goddard, for Mooring, Aldridge & Haydon, Bournemouth; G. H. Barber & Son.*

(1) L. R. 6 H. L. 265.
(2) L. R. 7 H. L. 568.
(3) [1901] 2 Ch. 441.
(4) 63 L. T. 159.

F. E.

ASTBURY J. 1913 Oct. 17.

In re HOWARD STREET CONGREGATIONAL CHAPEL, SHEFFIELD.

[1913 H. 1246.]

Burial Ground—Building upon Disused Burial Ground—Sale or Disposition "under the authority of any Act of Parliament"—Sale under Order of the Charity Commissioners—Disused Burial Grounds Act, 1884 (47 & 48 *Vict. c.* 72), *ss.* 3, 5—*Charitable Trusts Act*, 1853 (16 & 17 *Vict. c.* 137), *s.* 24—*Charitable Trusts Amendment Act*, 1855 (18 & 19 *Vict. c.* 124), *s.* 29.

Trustees of a disused Congregational chapel and burial ground attached were desirous of selling them together as a building site, and had applied to the Charity Commissioners for an order sanctioning the sale. The Charity Commissioners were willing to make the order if the Court would declare that such a sale would be "a sale under the authority of any Act of Parliament" within the meaning of the Disused Burial Grounds Act, 1884, and so exempt from the prohibition of building in that Act:—

Held, that the proposed sale under the order of the Charity Commissioners would not be "a sale or disposition under the authority of any Act of Parliament" within the meaning of s. 5 of the Disused Burial Grounds Act, 1884.

Semble, those words only apply where the Act is expressly or by necessary implication the authority which makes the sale effectual as regards the land itself.

On October 19, 1850, the fee simple of a chapel and piece of ground used as a burial ground in Howard Street, Sheffield, was conveyed to trustees upon trust at all times thereafter to allow the chapel to be used and enjoyed as a place for the public worship and service of Almighty God according to the tenets, doctrines, and discipline of Protestant dissenters of the denomination of Independents or Congregationalists, which were fully set out. The chapel had been in existence since 1789, but the premises were leasehold until 1850. The chapel was used according to the trusts of the deed until 1902, when, the membership of the church having greatly decreased, the church was dissolved and the services in the chapel were discontinued. The last interment in the burial ground was made in 1872. New trustees had been appointed from time to time. The trustees desired to sell the chapel and burial ground as a building site;

they had applied to the Charity Commissioners, who had intimated that if all bodies were removed from the burial ground under proper authority, and if the Court decided that a sale under the authority of the Charity Commissioners was a sale under the authority of any Act of Parliament within the meaning of s. 5 of the Disused Burial Grounds Act, 1884, they would be prepared to make a scheme authorizing the sale of the property without any restrictions, and give directions as to the application of the proceeds thereof. The Home Office had stated that they were prepared to consider favourably the issue of a licence to remove the bodies if arrangements satisfactory to them were carried out.

This summons was taken out by the trustees for the determination of the question whether a sale of the chapel and burial ground made by the applicants in pursuance of an order of the Charity Commissioners under the authority of the Charitable Trusts Acts, 1853 to 1894, would be a sale under the authority of any Act of Parliament within the meaning of s. 5 of the Disused Burial Grounds Act, 1884.

The sections of that Act and the Charitable Trusts Acts, 1853 and 1855, affecting the question are set out below. (1)

(1) The Disused Burial Grounds Act, 1884:—

Sect. 3. "After the passing of this Act it shall not be lawful to erect any buildings upon any disused burial ground, except for the purpose of enlarging a church, chapel, meeting house, or other places of worship."

Sect. 5: "Nothing in this Act contained shall apply to any burial ground which has been sold or disposed of under the authority of any Act of Parliament."

The Charitable Trusts Act, 1853, s. 24: "Upon application to the said Board by the trustees or persons acting in the administration of any charity, representing to the said Board that, under the special circumstances of any land belonging to the charity, a sale or exchange of such land can be effected on such terms as to increase the income of the charity, or would otherwise be advantageous to the charity, such Board may, if they think fit, inquire into such circumstances, and if after inquiry they are satisfied that the proposed sale or exchange will be advantageous to the charity, may authorize the sale or exchange, and give such directions in relation thereto, and for securing the due investment of the money arising from any such sale, or by way of equality of exchange for the benefit of the charity, as they may think fit."

The Charitable Trusts Amendment Act, 1855, s. 29: "It shall not be lawful for the trustees or persons acting in the administration of any

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John Dixon (*Hon. Frank Russell, K.C.*, with him), for the trustees. The trustees wish to sell the chapel and burial ground for building purposes. It is suggested that the purchaser will not be able to build on the burial ground by reason of s. 3 of the Disused Burial Grounds Act, 1884. The trustees have no power of sale and cannot sell except with the consent of the Charity Commissioners under the Charitable Trusts Acts, 1853, s. 24, and 1855, s. 29. We submit that the sale is therefore made under the authority of an Act of Parliament within the proviso in s. 5 of the Disused Burial Grounds Act, 1884.

Austen-Cartmell, for the Attorney-General. It is not correct to say that trustees of charities have no power of sale except under the Charitable Trusts Acts. They had power to sell before those Acts and frequently did so. The sales were liable to be set aside by the Court of Chancery if they were not for the benefit of the charity, but unless so set aside they were good. The Act of 1853, s. 24, gives power to the Commissioners to inquire whether a sale is for the benefit of the charity and, if satisfied it is so, to authorize it. It does not create a power of sale. Then the Act of 1855, s. 29, forbade trustees to sell except with the express authority of Parliament, or of a Court or judge, or in pursuance of a scheme, or with the approval of the Commissioners. In that section a sale with the authority of Parliament is distinguished from a sale with the approval of the Commissioners.

In *Attorney-General* v. *Trustees of the London Parochial Charities* (1) Stirling J. (as he then was) held that a sale under Michael Angelo Taylor's Act (57 Geo. 3, c. xxix.) was a sale under the authority of an Act of Parliament within the meaning of s. 5 of the Disused Burial Grounds Act, 1884, but he carefully examined the proceedings under that Act in that case, and sums

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charity to make or grant, otherwise than with the express authority of Parliament, under any Act already passed or which may hereafter be passed, or of a Court or judge of competent jurisdiction, or according to a scheme legally established, or with the approval of the Board, any sale, mortgage, or charge of the charity estate, or any lease thereof in reversion after more than three years of any existing term, or for any term of life, or in consideration wholly or in part of any fine, or for any term of years exceeding twenty-one years."

(1) [1896] 1 Ch. 541, 548.

up: "Each step was taken under and in accordance with the authority conferred by the statute, and from that authority alone the sale derived its validity." He then refers to an argument which had been pressed upon him that if a sale under Michael Angelo Taylor's Act was within the section a sale under the Settled Land Act by a tenant for life would also be within it, and says: "I should be very slow to arrive at any such conclusion."

The judgments of Kay L.J. in *In re Mason's Orphanage and London and North Western Ry. Co.* (1) and of Davey L.J. (delivering the judgment of the Full Court of Appeal) in *In re Clergy Orphan Corporation* (2) shew that charity trustees had a power of sale before the Act of 1853. The sale therefore does not derive its validity from the statute alone. We submit that a sale is only made under the authority of an Act of Parliament within the meaning of the Disused Burial Grounds Act, 1884, in cases where the Act is expressly or by necessary implication the authority which effectuates the sale as to that particular land.

John Dixon in reply.

ASTBURY J. This is a summons by the trustees of a charity asking that it may be determined whether a sale of the chapel and burial ground situate in Howard Street, in the city of Sheffield, belonging to the charity, if such sale were made by the applicants in pursuance of an order of the Board of Charity Commissioners for England and Wales under the authority of the Charitable Trusts Act, 1853, s. 24, would be a sale under the authority of any Act of Parliament within the meaning of s. 5 of the Disused Burial Grounds Act, 1884.

The facts, in so far as they are relevant, are very short. The applicants had vested in them a chapel in which no services have been held since 1902, and a burial ground in which no burials have taken place since 1872; both have been closed since these dates, and are not likely to be again used for the purposes for which they were originally built and made. An application has been made to the Board of Charity Commissioners and the Board have signified that they would, if

(1) [1896] 1 Ch. 596, 603. (2) [1894] 3 Ch. 145, 154.

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all bodies were removed from the burial ground under proper authority, and if the Court decides that a sale under the authority of the Charity Commissioners is a sale under an Act of Parliament within the meaning of s. 5 of the Disused Burial Grounds Act, 1884, be prepared to make a scheme authorizing the sale of the property without any restrictions, and give directions as to the application of the proceeds. The short point I am asked to decide is a difficult question, and I think an important one. Under s. 3 of this Act it is made perfectly clear that it shall not be lawful to erect any buildings upon any disused burial ground except for certain specified purposes, and s. 5 is a proviso upon that, that nothing in the Act contained shall apply to any burial ground which has been sold or disposed of under the authority of any Act of Parliament. Whether those words ought to be given a limited or a wider construction is a matter of some difficulty, but the only question I have to decide on this summons is whether an authority to sell under s. 24 of the Act of 1853 falls in fact within the language of s. 5. Sect. 24 is as follows: [His Lordship read the section and continued:] In *Attorney-General* v. *Trustees of the London Parochial Charities* (1) Stirling J. held that where a disused burial ground was acquired by the Commissioners of Sewers for the city of London under the powers of 57 Geo. 3, c. xxix., for the purpose of street improvements the sale to them was in fact a sale or disposition under the authority of an Act of Parliament within the meaning of the statute. The learned judge during the argument of the case said that if s. 5 of the Act of 1884 is to be read literally a sale under the Settled Land Acts would seem to come within it. Counsel who appeared for the defendants suggested in answer that (2) "The Acts contemplated by the section are Acts enabling particular lands to be sold which could not otherwise be so dealt with. In the case of the Settled Land Acts, the disability is in the vendor; in the case of Acts contemplated by the section the disability is in the land itself." Stirling J. in giving judgment went through the powers of the Act of 57 Geo. 3, c. xxix., and proceeded as follows: "The commissioners derived

(1) [1896] 1 Ch. 541. (2) [1896] 1 Ch. 545, 548.

their power to purchase, and the charity trustees their power to sell, from the statute. Each step was taken under and in accordance with the authority conferred by the statute, and from that authority alone the sale derived its validity." Then a little lower down he said: "It was said that some limitation must be put on the words of the enactment, otherwise a sale by a tenant for life under the powers conferred by the Settled Land Acts would fall within it, with the result that a disused burial ground, if sold by a tenant for life, might be built upon, while if sold by an absolute owner it could not. I should be very slow to arrive at any such conclusion, and if to escape from it some limitation must be put upon the language of the Act, that will have to be considered when the case arises." In the present case it seems to me that the question I have to decide depends upon whether an authority given under s. 24 of the Act of 1853 is in fact an authority which makes a sale of the land qua land possible or whether it is not merely an authority of the Board after the obtaining of which no question can be raised as to the beneficial or non-beneficial character of the sale. Prior to the Charitable Trusts Act there was no common law prohibition against a sale by trustees of charity lands vested in them although no express power of sale was given to them under their document of trust, but all such sales were liable to be upset if not for the benefit of the charity. In *In re Mason's Orphanage and London and North Western Ry. Co.* (1) Kay L.J., after referring to the Acts of 1853 and 1855, says: "Before this time, charities, even where they had not an express power of sale, had been in the habit in many cases of selling the property which belonged to them. The sale might not be good unless it was shewn—and the onus was on the purchaser to shew—that it was for the benefit of the charity that the sale should be made. Then in other cases they had express power to sell by the original instrument of trust, and that was a second case in which trustees of a charity might sell. Again, under the Act of 1853 they might sell, where they had no express power to sell, with the sanction of the Charity Commissioners." And in the case of *In re Clergy*

(1) [1896] 1 Ch. 596, 603.

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Orphan Corporation (1) Davey L.J., giving the decision of the Court of Appeal, said this: "Mr. Vaughan Hawkins contended that a charity cannot sell its land by law independently of the Charitable Trusts Acts. We think that statement is too broad. A charitable corporation can sell and pass the legal estate to a purchaser, but he takes it subject to the obligation of shewing that the sale was beneficial to the charity and justified by the circumstances," and cited *Attorney-General* v. *Warren* (2) for that proposition. Having regard to these decisions, and to what I understand to be the law generally, I think that the real effect of s. 24 is that it enables the Commissioners to decide whether in fact the sale shall be unimpeachable, but the sale of land, if they so decide, is not in fact made under the authority of the Act; what the Act really does is to authorize the sale in the sense of authoritatively affirming that it is one beneficial to the charity as distinct from authorizing it in the sense that it alone enables an effectual passing of the property to take place between the vendor and the purchaser. This view, I think, is confirmed by s. 29 of the Charitable Trusts Amendment Act, 1855, which is as follows: [His Lordship read the section and continued:] This appears to me to recognize a power of sale in charity trustees where not prohibited by statute, and I think it may be taken as also recognizing, at all events to some extent, that a sale under a power of the Board is not a sale under the authority of Parliament as referred to in that section.

It has been suggested to me that the reasonable meaning of s. 5 of the Disused Burial Grounds Act is that it refers to a sale under the authority of an Act of Parliament where the Act is expressly or by necessary implication the authority which effectuates the sale or disposition as to that very land. Whether this is a true or a sufficient definition it is not necessary for me to decide. It seems to me to be reasonable as far as it goes. It is sufficient for me to determine in this case for the above reasons, and I do so determine, that an authority under s. 24 of the Charitable Trusts Act, 1853, does not make the sale of the land, for which such authority is given, a sale or disposal under

(1) [1894] 3 Ch. 145, 154. (2) (1818) 2 Swans. 291, 302.

the authority of an Act of Parliament within the meaning of s. 5 of the Disused Burial Grounds Act, 1884, and in my view this decision in no way militates against the scope or reasoning of Stirling J.'s decision in *Attorney-General* v. *Trustees of the London Parochial Charities.* (1)

Solicitors: *Cree & Son, for Pye-Smith & Barker, Sheffield; Solicitor to the Treasury.*

J. R. B.

In re SALE.
NISBET *v.* PHILP.

[1913 S. 1532.]

Tenant for Life and Remainderman—Preference Shares—Cumulative Preferential Dividend—Arrears—Death of Life Tenant—Future Dividends—Apportionment.

Where preference shares carrying a fixed cumulative preferential dividend are bequeathed in trust for a life tenant and remaindermen, and no dividend is declared or paid for the financial years including the life tenancy, the life tenant's executors are not entitled to have the arrears made good out of future preferential dividends.

In re Taylor's Trusts [1905] 1 Ch. 734, and *In re Armitage* [1893] 3 Ch. 337, followed and applied.

In re Griffith (1879) 12 Ch. D. 655, and *Bulkeley* v. *Stephens* [1896] 2 Ch. 241, distinguished.

ORIGINATING SUMMONS.

By her will dated July 20, 1908, a testatrix, after appointing the plaintiff and another person her executors and trustees, devised and bequeathed her real and personal estate to her trustees upon trust to retain in its present state of investment or at such times as they should think fit to sell the same and after payment of funeral and testamentary expenses, debts, and legacies to invest the residue as therein mentioned and to stand possessed thereof upon trust to pay the income thereof to a certain life tenant for life and after her death upon trust for certain remaindermen in equal shares absolutely.

The testatrix died on September 30, 1909. The will was proved

(1) [1896] 1 Ch. 541.

ASTBURY J. 1913 SALE, *In re.* NISBET *v.* PHILP.

and the trusts executed by the plaintiff alone. The estate was cleared and the income duly paid to the life tenant until her death on June 8, 1912, when the estate became divisible.

At the time of her own death the testatrix held 375 preference shares of 5*l.* each in the Alliance Economic Investment Company, Limited, incorporated in July, 1871. These carried a cumulative preferential dividend of 5 per cent. per annum. They were created by special resolutions of October 8 and 29, 1878, which provided "That the preferred shareholders shall receive a dividend at the rate of five per cent. per annum on the amount paid up on the preference shares before the ordinary shareholders receive any dividend, and the profits of subsequent years shall be applicable preferentially to make up any deficiency in a five per cent. dividend to the preferred shareholders in preceding years."

The articles provided as follows :—

Article 54. All dividends shall be declared by the ordinary general meetings; but the directors may declare an interim dividend for the first half of the year included in the annual statement of accounts.

Article 55. No dividend shall be payable except out of the profits arising from the business of the company, and the income arising from moneys set aside out of the profits; and no dividend shall be declared greater than that recommended by the directors.

Article 56. The directors may, before recommending any dividend, set aside out of the profits of the company such sum as they think proper as a reserve fund, to meet contingencies or for equalizing dividends, or for repairing or meeting the depreciation or maintaining the value of any property of the company, and may employ or invest the sum so set apart in such manner as they think proper, or permit the same to remain with the company's bankers on deposit or current account.

The company's accounts were made up to January 31 in each year, and the preferential dividends up to the year ending January 31, 1908, were declared and paid in full. For the year ending January 31, 1909, only 2 per cent. was paid and for the subsequent years no dividend was declared or paid, so that the arrears accruing during the life tenancy amounted to about 250*l.*

The company had, however, built up a large sinking fund to replace the purchase value of leaseholds and had carried considerable sums to reserve, and there was a possibility that payment of dividends on the preference shares might be resumed in some future year.

On the death of the life tenant the estate of the testatrix with the exception of the 375 preference shares and a sum of 118*l.* cash was divided between the remaindermen, the preference shares being retained to meet a claim by the life tenant's executors, who contended that they were entitled to their 250*l.* arrears out of any future preferential dividends that might be declared and paid on the preference shares.

On May 22, 1913, the plaintiff issued this summons to determine the point.

Baden Fuller, for the plaintiff.

Owen Thompson, for the life tenant's executors. On the wording of the special resolutions the arrears are a first charge on the profits of subsequent years available for dividend, and the life tenant's executors are therefore entitled to be paid 250*l.* out of any future dividends on the 375 shares. They are at all events entitled to a first charge on any back dividends declared and paid in respect of the arrears incurred during the years including the life tenancy, and the trustee ought to retain the shares until their claims are satisfied.

The exact point does not appear to be covered by authority, but the cases on the Apportionment Act, 1870 (33 & 34 Vict. c. 35), are analogous.

In *In re Griffith* (1) a testator died on November 8, 1875, and a quinquennial bonus for the five years ending December 31, 1878, was held apportionable between his estate and the legatees of his shares.

In *Bulkeley* v. *Stephens* (2) the life tenant of certain corporation stock died on September 2, 1894, and the stock was shortly after sold cum dividend for purposes of distribution under an order made in the absence of her representatives. A dividend for the year ending December 31, 1894, was subsequently

(1) 12 Ch. D. 655, 665. (2) [1896] 2 Ch. 241, 249.

ASTBURY J. 1913 SALE, *In re.* NISBET *v.* PHILP.

declared and paid to the purchasers. Stirling J. held that the life tenant's estate had no right of apportionment against the purchase-money, but he expressly pointed out that if the trust had been properly carried out by a transfer to the beneficiaries the life tenant's estate would have been entitled to an apportionment, and in the circumstances he allowed the claim against other income in the trustee's hands.

In the present case no sale is contemplated, and we have applied in time to protect our rights. The cases are discussed in Gover on Capital and Income, 2nd ed. pp. 21, 22, 23.

Arnold Herbert, K.C., for the remaindermen. This is an unprecedented application which if acceded to would practically render the winding up of estates impossible. In the present case the testatrix's estate would have the first claim for the arrears during her own life. But the claim is absolutely untenable. The fallacy lies in the assumption that back dividends are declared for the years in which the arrears occurred. That is not so. The arrears merely increase the quantum of preferential dividend lawfully declarable. The actual dividend is declared from the profits of the year of declaration. It is income of that year and belongs to the shareholders for the time being: *In re Taylor's Trusts.* (1)

Again the testatrix obviously intended the life tenant to receive the dividends declared for the years including her life tenancy, the last dividend being apportioned up to her death: *In re Armitage.* (2) She clearly did not intend to give the life tenant any claim against possible future dividends. In *In re Griffith* (3) the bonus was declared for the preceding five years and was apportionable accordingly, and in *Bulkeley* v. *Stephens* (4) the dividend was declared for a year including the last eight months of the life tenancy and was apportionable accordingly. Those cases do not touch the present point.

ASTBURY J. (after stating the facts). The question is whether the remaindermen are entitled to these preference shares or whether the life tenant's executors have any claim on them in respect of possible future dividends.

(1) [1905] 1 Ch. 734, 737, 738.
(2) [1893] 3 Ch. 337, 346.
(3) 12 Ch. D. 655, 665.
(4) [1896] 2 Ch. 241, 249.

On behalf of the life tenant's executors I have been referred to two authorities, namely, *In re Griffith* (1) and *Bulkeley* v. *Stephens*. (2)

In re Griffith (1) merely decided that a quinquennial bonus payable by an insurance company fell within the definition of "dividend" in the Apportionment Act, 1870, and was apportionable accordingly. Jessel M.R. said: "Now, the testator died in the middle of the five years, so that part of the profits had accrued during his life and part after his death. He specifically bequeathed the shares. The legatee of the shares takes them subject to the Act of Parliament, which says this, that when the bonus or share of profit, or whatever you may choose to call it—'payment' is the term in the Act of Parliament—when that payment is made, although in fact it may have accrued to a greater extent during the last two years than the previous three years, or vice versa, it shall be treated like interest on money and be considered as accruing from day to day. Therefore, when you get this bonus or payment declared, you are to treat it as interest on money from day to day."

In *Bulkeley* v. *Stephens* (2) corporation stock was settled on a life tenant and remaindermen. The life tenant died on September 2, 1894, and on January 29, 1895, the stock was sold cum dividend for purposes of distribution under an order made in the absence of the life tenant's representatives. In June, 1895, the corporation declared and paid a dividend in respect of the year ending December 31, 1894, and this was received by the purchasers of the stock. Stirling J. held that the life tenant's estate had no right of apportionment against the purchase-money, but as the dividend had been declared for the year in which the life tenant died, he allowed the claim against other income in the trustee's hands.

Those cases do not, however, determine the question before me, as no dividend has been declared for any part of the period including the life tenancy.

On the other hand the remaindermen relied on *In re Taylor's Trusts* (3), in which the question before me was substantially disposed of. In that case mortgage bonds of a Mexican railway

(1) 12 Ch. D. 655, 665. (2) [1896] 2 Ch. 241, 249.
(3) [1905] 1 Ch. 734, 737, 738.

ASTBURY J. 1913 SALE, *In re.* NISBET *v.* PHILP.

contained a promise to pay the principal and 6 per cent. cumulative interest "as and when earned" out of the net earnings of any year with a proviso that any deficiency should be paid to the holder out of the net earnings of any subsequent year or years "as and when there shall be any net earnings available for such purpose." The bonds were settled on a life tenant and remaindermen. The interest was never paid in full and the deficiency was never made up. The trustees sold the bonds in March, 1902, and the life tenant died in May, 1902. Buckley J. held that the life tenant's representatives had no right against the purchase-money in respect of the deficiency of interest. He said: "It is obvious that that purchase price included all expectation of everything which was to come under the bonds. It included arrears—if that word can be used in any proper sense—of interest on the bonds as well as principal money in respect of the bonds; and, if there were arrears which accrued during the currency of the tenancy for life, I have no doubt that an apportioned part of the purchase price ought to be paid to the tenant for life." This would be in accordance with the decisions I have already referred to. Buckley J. then examined the bond and continued: "It seems to me that under that instrument there was no interest payable at all as income of a year in which there was no fund available for its payment. Suppose that in the year 1904 there was no fund available, and the tenant for life died on December 31, 1904. There was no income, I apprehend, payable to that tenant for life, because the obligation is to pay out of a fund, and there was no fund. If in the year 1905 a fund came into existence, the interest calculated for the year 1904 would be payable, I agree; but it would be income of the year 1905, and not income of the year 1904. And if a second tenant for life were in the enjoyment of the property in 1905, that tenant for life, and not the previous tenant for life, would, it seems to me, take that interest. It all turns on this—that there is no obligation in this instrument to pay interest in any event; there is only an obligation to pay interest out of a fund, and there is no obligation to pay until there is such a fund; and if there be not such a fund during the existence of the tenancy for life, then the tenant for life, as it appears to me, is not entitled to any interest."

A similar result in the present case follows a fortiori. The resolution creating the cumulative preference shares is in common form and the articles provide for the declaration of dividends in the usual way out of profits and for the creation of a reserve fund at the directors' discretion. [His Lordship read the resolution and articles 54, 55, 56.] The life tenant had no right to a fixed dividend charged on profits in any event. She had merely a right to a preferential dividend as and when the directors of the company chose to declare it, and no dividend for any part of the life tenancy period was in fact earned or declared.

The remaindermen also relied on *In re Armitage* (1), where Lindley L.J. said: "What does a man mean when he leaves shares to a tenant for life? He means that that tenant for life shall have the income arising from the shares in the shape of dividends or bonuses declared during the lifetime of the tenant for life. He does not mean that the tenant for life shall receive profits in any other sense."

That passage is applicable to the present case. On the true construction of the will the testatrix in my judgment intended that on the life tenant's death the shares and all dividends declared for periods subsequent to that date should belong to the remaindermen absolutely. The claim of the life tenant's executors therefore fails.

Solicitors: *Nisbet, Daw & Nisbet; Winterbotham & Miall.*

(1) [1893] 3 Ch. 337, 346.

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Oct. 15, 30.

In re McEUEN.

McEUEN *v.* PHELPS.

[1913 M. 1718.]

Administration—Life Tenant of Residue—Debts — Legacies — Estate Duty — Legacy Duty—Adjustment of Accounts between Tenant for Life and Remainderman.

The rule laid down in *Allhusen* v. *Whittell* (1867) L. R. 4 Eq. 295,—that in adjusting the accounts between the tenant for life of the residuary estate of a testator and the remainderman the executors must be taken to have paid the debts and legacies not out of capital only or out of income only, but with such portion of the capital as, together with the income of that portion for one year from the testator's death, was sufficient for the purpose—although it worked perfectly in that case and works equally well in any case where the capital subtracted from the gross estate before the ascertainment of residue is not subtracted before the end of the first year from the testator's death, is not to be slavishly followed in every administration where residue is settled, and is inapplicable in hard and fast terms to a case where the subtractions from the estate occur at periods substantially anterior to the close of the first year.

Allhusen v. *Whittell* was founded on *Holgate* v. *Jennings* (1857) 24 Beav. 623, and did not enlarge the principle of that case, which was that the intermediate income of what is eaten up by payment of debts, &c., before the ascertainment of residue, cannot itself be income of residue or payable as such to a tenant for life of residue.

Observations on *Lambert* v. *Lambert* (1873) L. R. 16 Eq. 320.

A testator died on February 6, 1911, having by his will given legacies to be paid free of all duty, and given his residuary estate as to each of four fifths thereof in trust for one of certain persons for life, with remainder to his or her children. The executors paid the estate duty, legacy duty, legacies and debts at various dates during the year immediately succeeding the testator's death, for instance, over 47,000*l.* for estate duty on April 1, 1911, legacy duty of 1370*l.* on July 1, 1911, legacies of about 14,000*l.* in June and July, and debts and funeral expenses amounting to nearly 600*l.* in May, 1911 :—

Held, (1.) that the equitable bookkeeping or mode of adjustment to be adopted, on taking the account of the share of income during the year succeeding the testator's death due to the tenants for life, was that there should be charged against them, in respect of the payments for estate duty, debts, funeral and testamentary expenses, and duty on legacies given free of duty, interest upon the capital sum which would, with such interest, make up the sums paid in respect of estate duty, &c., such interest being calculated only during the respective periods

from the death of the testator until the respective times when the sums paid for estate duty, &c., were in fact paid; and (2.) that the method of adjustment adopted in this particular case was not the only method available, and that extremely elaborate and minute calculations need not be gone through, in every case.

DAVID PAINTER McEUEN died on February 6, 1911. By his will he had appointed Thomas Phelps, Thomas Tettrell Phelps, C. H. McEuen, and C. E. Jones executors and trustees thereof, and after giving several legacies and annuities of considerable amount, to be paid free of all duty, the testator bequeathed 25,000*l.* to the trustees, upon trust for investment, and to stand possessed of the sum and investments upon trust to pay the income thereon to Ellen Dare for life, and after her death to pay thereout certain further legacies; and he declared that all legacy and other duty payable in respect of Ellen Dare's life interest in the 25,000*l.* should be paid out of his general residuary estate in exoneration of that sum, but that all legacy or other duty on the legacies given after her death should be payable out of such legacies respectively. The testator devised his residuary real and personal estate to the trustees, upon trust for sale and conversion, and out of the proceeds to pay his funeral and testamentary expenses and debts and the legacies, and to provide for the payment of the annuities and the duties on the legacies and annuities bequeathed free of duty, and to invest the residue and stand possessed thereof, upon trust to divide the same into five equal shares, and to hold two of the fifth shares upon trust for C. H. McEuen, two other fifth shares upon trust for E. S. McEuen, and the other fifth share upon trust for Jane Graham. The testator then declared that the trustees should hold one of C. H. McEuen's fifth shares in trust for him absolutely, and his other fifth share upon trust to apply and pay the income thereof to C. H. McEuen or for his benefit until he should forfeit the same, and then upon certain trusts, and after his death upon trust to pay out of the income 750*l.* per annum free of duty to his then wife, and subject as aforesaid upon trust for his child or children. The two fifth shares of E. S. McEuen were settled upon similar trusts in favour of himself, his wife and children, and the fifth share of Jane Graham was settled upon trusts in favour

SARGANT J. of herself for life or forfeiture, and afterwards of her child or children.

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The estate of the testator was valued at 404,093*l.* 10*s.* 7*d.*, in respect of which 47,427*l.* 12*s.* was paid for estate duty on April 1, 1911, together with 145*l.* 7*s.* 5*d.* interest thereon. This sum was borrowed temporarily by the executors from a bank and 201*l.* 13*s.* was paid to the bank by way of interest on the loan. In addition a further sum of 1370*l.* 7*s.* 10*d.* was paid for duty on the legacies given by the will (other than the settled sum of 25,000*l.*) on July 1, 1911. The sum of 92*l.* 15*s.* was also paid in South Africa, in respect of property of the testator there, on April 18, 1911, and a further sum of 8*l.* 0*s.* 10*d.* on May 20, 1911, the total amount so paid for duty up to July 1, 1911, being over 48,000*l.* On July 1 25,000*l.* was set apart by the executors to provide for Ellen Dare's trust legacy. The other legacies amounted to 13,935*l.* 18*s.*, of which 9835*l.* 18*s.* was paid about June 1, 1911, 300*l.* about July 21, 1911, 2800*l.* about October 31, 1911, and 1000*l.* about November 20, 1911. About May 13, 1911, the executors paid debts amounting to about 400*l.*, and the funeral expenses of 182*l.* 10*s.* 3*d.*, and in April and May, 1911, they paid other testamentary expenses amounting to 286*l.* 19*s.* 5*d.*

The executors proceeded with the administration of the estate, and, after payment of the debts, funeral and testamentary expenses, and legacies, paid and transferred certain moneys and securities in part satisfaction of the fifth share of residue given to C. H. McEuen absolutely, and set apart or purchased securities in part satisfaction of the other four fifths which were settled. They also paid to the three tenants for life of shares in residue certain sums on account of the income thereof.

C. H. McEuen had two children living, who had both attained a vested interest under the will. E. S. McEuen had two children, both infants, who had not attained a vested interest, and Jane Graham had four children, all of whom had attained a vested interest.

It having been suggested that the income account under which the above payments to them had been made had been prepared upon wrong principles, and that certain amounts had been credited

to income which should have been credited to capital, so that overpayment had been made to the beneficiaries in respect of the income on their settled shares of the residue, an originating summons was taken out by C. H. McEuen, E. S. McEuen, and Jane Graham, against T. Phelps, T. T. Phelps, and C. E. Jones (the other executors) and the children of the three plaintiffs, for the determination of the following questions: (1.) Whether, upon taking the account of the share of income during the year ending February 6, 1912 (being one year from the testator's death), due to C. H. McEuen and Jane Graham respectively in respect of the one fifth share of the testator's residuary estate of which they were respectively tenants for life, and to E. S. McEuen in respect of the two fifth shares of the residue of which he was tenant for life, there should be debited against such shares of income interest at 4*l.* per cent. (the agreed rate) upon the capital sum which would, with such interest, make up the sum paid in respect of estate duty upon the estate of the testator calculated during the whole year from the date of his death, or only during the respective periods from the date of his death until the respective times when such duty was in fact paid; and (2.) whether, upon taking such account of the shares of income as aforesaid, there should be debited against such income interest, at such rate as aforesaid, upon the capital sums which would, with such interest, make up the amount of the debts of the testator, the funeral and testamentary expenses, and the legacies given by the said will and the legacy duty thereon when given free of duty, and the 25,000*l.* thereby bequeathed upon trust for Ellen Dare, and the legacy duty in respect of Ellen Dare's interest therein, calculated during the whole year from the date of the testator's death, or only during the respective periods from the date of such death until the times when such debts, funeral and testamentary expenses, legacies, and duties were respectively paid, and such sum of 25,000*l.* was set apart to meet the said bequest.

The summons was adjourned into Court and heard on October 15, 1913.

Romer, K.C., and *E. Knowles Corrie*, for the plaintiffs. The defendant remaindermen will doubtless rely on *Allhusen*

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v. *Whittell* (1) as establishing a hard and fast rule that although, as between themselves and the persons interested in the residue, executors may have recourse to any funds to pay debts and legacies, they must, in adjusting accounts between the tenant for life and remaindermen, be taken to have paid debts and legacies, not out of capital only or income only, but with such part of capital as, together with the income of that part for a year from the testator's death, was sufficient for the purpose. The equitable bookkeeping or adjustment applied there may have been perfectly just in the circumstances of that case, but it is not of general application, as in many cases, including the one now before the Court, it would work injustice to the tenant for life.

The decision in *Allhusen* v. *Whittell* (1) is founded on *Holgate* v. *Jennings*. (2) There the testator gave his residuary estate in trust to pay certain legacies amounting to 16,000*l.* within six months after his decease, and as to the residue of his estate and effects to pay the annual proceeds to his wife for life, and after her death to divide the corpus amongst certain nephews. The testator died on January 24 possessed of Consols and other property. His widow, the executrix, retained the July dividends on all the Consols and then on July 20 sold enough Consols (about 16,279*l.*) to pay the legacies to the nephews. They claimed to have the dividends on the stock sold as part of the residue. The chief clerk charged the widow with the amount of dividends, and his decision was upheld by Sir John Romilly M.R., who said he "must ascertain the residue and give the income from the death of the testator." In *Lambert* v. *Lambert* (3) Bacon V.-C. certainly said that the principle enunciated in *Allhusen* v. *Whittell* (1) must govern if applicable to the case before him, and that he was unable to draw any distinction between the two cases, but the report shews that the previous order on further consideration had directed an inquiry what amount of capital, with the income for one year on that amount, was required to pay the funeral and testamentary expenses, including the costs of the suit, debts and legacies, with interest thereon until the time of payment. In *Marshall* v. *Crowther* (4) Hall V.-C. applied the principle of

(1) L. R. 4 Eq. 295.
(2) 24 Beav. 623, 627.
(3) L. R. 16 Eq. 320.
(4) (1874) 2 Ch. D. 199.

Allhusen v. *Whittell* (1) to real estate. In actual practice the rule applied in that case has not been universally applied. In the present case the equitable bookkeeping or adjustment to be adopted is, on taking the account of the share of income during the year succeeding the testator's death due to the tenants for life, that there should be chargeable against them, in respect of the payments for estate duty, debts, testamentary expenses, legacies, and duty on legacies given free of duty, interest at 4 per cent., the rate agreed on, calculated only until the respective dates of payment on the various sums of capital which would together with such interest make up the various sums paid.

A. Grant, K.C., and *H. J. H. Mackay*, for the defendants other than the trustees and executors. The rule stated in *Allhusen* v. *Whittell* (1), which is older than that case, ought to be followed: see *Dimes* v. *Scott.* (2) It has been followed repeatedly and is stated in every text-book. For instance in Williams on Executors, 9th ed. p. 1246, note, there is the following passage: "The executors must not be taken to have applied the whole income. Until the debts and legacies were paid there would have been no interest which by any possibility could have come to the tenant for life. It is necessary to ascertain what part, together with the interest of such part for a year, would be wanted for the payment of debts, legacies, and other charges during the year, and the proper and necessary fund must be ascertained by including the income for one year which may arise upon the fund which may be so wanted." In other words, the estate must be dealt with notionally as at the end of the first year from the testator's death. The basis of the rule is that a period of twelve months is allowed for distribution of the estate, and it is only at the end of that period that you can say what is residue. The executors may pay one debt on each of the 365 days of the year, but it is only at the end of the year that they can distinguish between capital and income. The debts are then deemed to have been paid out of a mixed fund of capital and income, and to have been paid proportionately out of capital and the income for the year. The forms of orders are stereotyped in Seton on Judgments, 5th ed. vol. ii. pp. 1411, 1412. It is scarcely

(1) L. R. 4 Eq. 295. (2) (1827) 4 Russ. 195.

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correct to say that *Allhusen* v. *Whittell* (1) has not been followed in practice. The principle was followed in *Lambert* v. *Lambert* (2), the head-note of which has been long accepted as correctly stating the rule, namely, "that in adjusting the account of a testator's estate between tenant for life and remainderman, the debts and legacies are to be taken as having been paid, not out of capital only, but with such portion of the capital as together with the income of that portion for one year is sufficient for the purpose," although "the debts and legacies have been paid before the expiration of a year from the testator's death." The rule is stated to the same effect in Gover on Capital and Income, 2nd ed. p. 132 (although the learned author of that book comments unfavourably on it), and in Halsbury's Laws of England vol. xiv. p. 281. This fixed rule should be followed, and the adjustment should not depend on the caprice of executors as to the time when debts and legacies are to be paid. The rule may in some cases work unfairly to the tenant for life, but in the administration of estates and the construction of wills rules are adopted for convenience which often work injustice, as for instance the rule in *Bulkeley* v. *Stephens*. (3)

Romer, K.C., in reply. Text-writers by no means agree in their statements of the rule which the remaindermen now seek to have applied. In Jarman on Wills, 6th ed. vol. ii. p. 1230, it is said that "income arising within the first year from so much of the testator's estate as is required for payment of debts and legacies, is not income arising from residue. In other words, there is no residue till these payments have been made, and the tenant for life must keep down the interest on debts as well during the first as during subsequent years." [He also referred to Seton on Judgments, 7th ed. vol. ii. p. 1620; White and Tudor's Leading Cases in Equity, 7th ed. vol. i. p. 89; and Lewin on Trusts, 12th ed. p. 337.]

F. Whinney, for the defendant trustees and executors.

Cur. adv. vult.

Oct. 30. SARGANT J. The originating summons in this case seeks directions as to the true method of apportioning

(1) L. R. 4 Eq. 295. (2) L. R. 16 Eq. 320.
(3) [1896] 2 Ch. 241.

between capital and income certain large payments which have been made during the first year of the administration of the testator's estate. The payments are divided in the summons into two sets, namely, first, those which have been made for estate duty, including interim interest thereon, and secondly, those which have been made for debts and funeral and testamentary expenses and for legacies, including legacy duty on such of them as were given free of duty. It is not desired that accounts should be taken or precise figures ascertained by the Court, but merely that the true principle of apportionment should be settled, since it is anticipated that when once that has been done a friendly adjustment of the accounts can readily be arrived at.

The testator died on February 6, 1911. By his will his residue is divided into fifths, and four of these fifths are settled upon trusts under which his three children, the plaintiffs, take life interests, and their children, who, or some of whom, are defendants, take in remainder. The estate is a large one, and its administration has already involved the payment of some 49,000*l.* for estate duty, of which some 47,450*l.* was paid on April 1, 1911. Debts and funeral and testamentary expenses amounted together to some 1300*l.*, in respect of which 900*l.* or thereabouts was paid early in May, 1911. And besides a trust legacy of 25,000*l.*, which was set apart on July 1, 1911, there were other legacies to an aggregate of some 14,000*l.*, which was was paid as to 10,000*l.* by June 1, 1911, and as to the remainder by the middle of November. It is conceded on both sides that neither set of payments ought to be thrown exclusively on the capital, but that in each case some income should be taken as employed for that purpose; the dispute between the parties is as to the amount of income to be so applied. The defendants (by which I mean the defendants other than the defendant trustees) say that the income must be ascertained or calculated as the income on the capital applied for a whole year, irrespective of the actual date of application. The plaintiffs say that the income must be ascertained as that earned by the capital applied down to the date of application only. The rate at which income should be ascertained has been accepted as being 4 per cent. per

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As a matter of strict fairness, and independently of all questions of authority, practice, and convenience, it is pretty obvious that the plaintiffs' method is the preferable one. For it would result in giving the tenants for life the income, and no more than the income, of the capital ultimately available for the remaindermen; while the defendants' plan would, in respect of every application of capital in the course of the first year, deprive the tenants for life during the residue of that year of the income on such a part of the capital ultimately available as was equal to the sum applied. In the present case, for instance, in respect of the first payment of 47,450*l.* for estate duty, the tenants for life would not only during the remainder of the first year make in respect of the subtraction of that sum a loss of income corresponding with the ultimate loss of capital by the remaindermen, but they would also make a special loss of income by the charge against them of 4 per cent. on 47,450*l.* from April 1, 1911, to February 6, 1912; while the remaindermen would not only suffer no corresponding loss, but would actually have their primary loss of 47,450*l.* reduced to the extent of the special charge thus made against income. And the same considerations apply to all the items making up the two sets of payments now in question.

To make the matter even more clear, assume that a testator leaves a gross estate of 102,000*l.*, with estate duty, debts, &c., amounting to 52,000*l.*, and that the executors do (however impossible this may in fact be) clear off all these liabilities the day after the death, with the result that the residue is at once ascertained at 50,000*l.* and earns during the year at 4 per cent. a sum of 2000*l.* According to the defendants' theory, the 52,000*l.* of liabilities must be deemed to be discharged out of 50,000*l.* capital and 2000*l.* income. The result will be that the tenant for life has to give up the whole income earned by the remaining 50,000*l.* during the first year, and gets no income at all during that year, and further that the capital ultimately available for the remaindermen is increased to 52,000*l.* The result is startling, but not so startling as would be the case if the debts immediately discharged had been, say, 60,000*l.*

or 70,000*l.*; for then on the same principle the income of the tenant for life during the first year would be a minus quantity. On the other hand, if the plaintiffs' method of calculation is adopted, the tenant for life would, both for the first year and for every subsequent year, be entitled to income on 50,000*l.*; and this would be the sum ultimately available for the remaindermen.

It would be easy to suggest other cases in which the method suggested by the defendants would work equally obvious hardship and injustice. But nothing would be gained by merely multiplying instances.

In the course of the argument the defendants' counsel had to recognize to some extent the anomalies in administration that would result from their method. And ultimately they were forced to rely mainly on the contention that the matter was concluded by the authority of *Allhusen* v. *Whittell* (1) and *Lambert* v. *Lambert* (2); or at all events that their view of the effect of these two cases had been so universally accepted in the profession and adopted in the administration of estates that it was impossible now to disregard or modify it, however severe the injustice it might produce in any particular case. After repeated examination of the case of *Allhusen* v. *Whittell* (1) I am unable to accept the defendants' view of it. In my opinion, that case was founded on the broad equitable principle that where residue was limited to persons in succession, their successive enjoyment should be an enjoyment of the same fund; and that, for effecting that result, the Court was at liberty, and, indeed, bound, to enter into a sort of equitable bookkeeping or adjustment. In the particular case in question three-fourths of the first estate, which formed the main asset of the second estate, was eaten up by the payment of very large legacies which would not in the ordinary course be, and I gather were not, paid before the end of the first year from the first testator's death. And the bookkeeping that was directed was primarily for the purpose of preventing the tenant for life of the second estate from receiving in respect of part of the first year from the first testator's death the income of capital prospectively applicable at its close for legacies, and so getting an income during that period which would be at a rate three or

(1) L. R. 4 Eq. 295. (2) L. R. 16 Eq. 320.

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four times greater than the income of any subsequent period. But while the income receivable in respect of part of the first year was thus prevented from being *more* than in any subsequent year, there is not a word in the reasoning of the judgment, as I read it, to suggest that the income for that part of the first year should be any *less* than that for any subsequent year. The exact method of bookkeeping directed by the terms of the order in *Allhusen* v. *Whittell* (1) worked perfectly in that case, and would work equally well in any case where, as there, the capital subtracted from the gross estate before the ascertainment of residue is not subtracted before the end of the first year. But I can see no warranty in that case for applying the method in precisely the same hard and fast terms to a case where the subtractions from the estate occur at periods substantially anterior to the close of the first year. This is still clearer when it is observed that *Allhusen* v. *Whittell* (1) was professedly founded on earlier decisions, such as that in *Holgate* v. *Jennings* (2) (which itself was founded on *Morgan* v. *Morgan* (3) and *Dimes* v. *Scott* (4)), and did not, as I understand it, profess to carry the principle of *Holgate* v. *Jennings* (2) any further. That principle was that the intermediate income of what is eaten up before the ascertainment of residue cannot itself be income of residue or payable, as such, to a tenant for life of residue. *Allhusen* v. *Whittell* (1) merely affirmed that principle and gave expression to it in a form of words entirely suitable to meet that particular, and in many respects typical, case. It did not, in my judgment, prescribe an exact form of words for use in all cases, however dissimilar.

Great stress was laid by the counsel for the remaindermen on the decision in *Lambert* v. *Lambert.* (5) I think it was the case there that some debts had been paid before the expiration of the year; and, if so, the decree, in following the exact form in *Allhusen* v. *Whittell* (1), would produce a certain amount of inequality between tenant for life and remainderman to the prejudice of the former. But there is nothing in the report to

(1) L. R. 4 Eq. 295.
(2) 24 Beav. 623.
(3) (1851) 14 Beav. 72.
(4) 4 Russ. 195.
(5) L. R. 16 Eq. 320.

shew that the debts so paid were large, or the resulting inequality serious; and the very short judgment of Bacon V.-C. was not directed to that aspect of the case at all. The decision in the case was that the rule stated in *Allhusen* v. *Whittell* (1) did not require any modification, because the rate of interest earned by the estate happened to be unusually high (something like 13 per cent. on average). And, indeed, in *Lambert* v. *Lambert* (2) the learned judge was not deciding what form of order ought to be made. That had already been done by the order on further consideration of July 8, 1872. He was only working out the consequences of the actual terms of that particular order.

Nor can I find that text-writers are by any means unanimous in treating *Allhusen* v. *Whittell* (1) as establishing a fixed form of words which must be slavishly followed in every administration where residue is settled. This may be the effect of the footnote in Williams on Executors, 9th ed. vol. ii. p. 1246. But in Jarman on Wills, 6th ed. vol. ii. p. 1230, and Seton on Judgments, 7th ed. vol. ii. p. 1620, the effect of *Allhusen* v. *Whittell* (1) is much more broadly and correctly stated, while from White and Tudor's Leading Cases, 7th ed. vol. i. p. 89, and Lewin on Trusts, 12th ed. p. 337, little assistance can be obtained, since the rule is stated in both works in both the more general and the more precise way, as if they were identical. In Gover on Capital and Income, 2nd ed. p. 132, while the rule is stated as contended for by the defendants, the following remarks are immediately afterwards made, namely: "The above rule is, however, inconsistent with the principle enunciated by Knight Bruce V.-C. in *Caldecott* v. *Caldecott* (3), that the funeral and testamentary expenses and the debts and legacies (as to principal) must be borne by capital—the interest upon the debts and legacies by the life tenant: see also *Barnes* v. *Bond* (4); and, as there is often considerable difficulty in applying the rule in practice, it is not always followed." And in that useful work Chandler on Trust Accounts, 2nd ed. at pp. 89—91, there is an elaborate working out of an apportionment between capital and income which appears to me to be fair and correct, and which

(1) L. R. 4 Eq. 295.
(2) L. R. 16 Eq. 320.
(3) (1842) 1 Y. & C. Ch. 312.
(4) (1863) 32 Beav. 653.

SARGANT J. throws on income a proportion of debts, legacies, and other payments calculated with reference to the intermediate income only of the capital employed, and not with reference to the income of that capital during the whole year. I adopt the following observation on p. 90 of that work, and particularly that part of it which I have placed in italics: "Wherever the income arising from any asset applied in paying debts, funeral and testamentary expenses or legacies is itself, in fact, exhausted in paying debts, funeral and testamentary expenses or legacies, the income so applied should be carried over to the capital account with explanatory entries, and *to this extent the rule will have been fully complied with and no further adjustment will be necessary.*"

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Further, on the many occasions when I have heard the rule discussed amongst practitioners at the Chancery Bar, I have found the prevailing opinion to be that the rule in the set terms in which the order was drawn up in *Allhusen* v. *Whittell* (1) is not applicable indiscriminately, and would work grave injustice in cases where large sums have been expended in clearing the estate at intervals considerably prior to the end of the first year.

On the whole, then, I come to the conclusion that the Court is not bound, either by authority or any general course of practice, to any more precise rule than this, namely, that the book-keeping referred to by Wood V.-C. is to be of such a nature as to produce an equitable result between tenant for life and remainderman; and I consider that for this purpose the Court should be as careful to see that the tenant for life is not unduly penalized as it was in *Allhusen* v. *Whittell* (1) to see that the tenant for life was not unduly benefited. Accordingly, I propose to make a declaration in accordance with the second alternative in each of the first and second heads of the summons. I should add that, though I adopt this alternative in this case as that one of the two alternatives which is the preferable one, and also as an alternative which will work fairly between the parties, I do not by any means wish to lay down that this is the only method available, or that extremely elaborate and minute calculations must be gone

(1) L. R. 4 Eq. 295.

through, in every case. If, for instance, a particular asset of a testator, such as part of a sum of Consols or an amount on deposit with a bank, were applied with the intermediate interest on it in the discharge of the whole or the bulk or some one large item of the liabilities of the estate at any time during the first year, as, say, three months or six months after the death, the executors might well, in my judgment, leave the matter there to that extent, as Mr. Chandler suggests. The capital and interest of the asset would merely have disappeared in the course of ascertaining residue, without leaving any proper subject-matter for adjustment. Or in cases where the average income of the estate is quite low, there would be no appreciable ground for complaint if the capital of the estate duty itself were charged against capital, and the interest on it were charged against income, instead of dividing the total sum paid between capital and income with reference to the exact rate of interest yielded by the estate as a whole, or by the particular asset used to pay the duty. There may also be other methods of carrying out the equitable bookkeeping referred to in *Allhusen* v. *Whittell* (1) which will give their fair relative rights in the same residuary fund to both tenant for life and remainderman; and some methods may be more appropriate in some cases and other methods in other cases. The actual accountancy will not be difficult so long as the true object is borne in mind.

Further, it must not be overlooked that the equitable adjustment dealt with in *Allhusen* v. *Whittell* (1) is not really more applicable to the first year after the death than to any other subsequent period, in cases where the administration extends beyond the end of the first year. For instance, I notice that in this case at the end of the first year it was anticipated that a large further payment would still have to be made for estate duty. When this payment is made, the total paid for capital and interest will have to be apportioned between capital and income on the basis of a calculation of interest beyond the first year and down to the subsequent date of payment.

I am relieved by Mr. Romer of the task of deciding a small further point which was mentioned in the course of the argument,

(1) L. R. 4 Eq. 295.

SARGANT J. 1913 McEUEN, *In re.* McEUEN *v.* PHELPS.

namely, whether any adjustment should be made as between capital and income of a sum of 2500*l.* which will come back to the estate on the death of the tenant for life of the settled legacy of 25,000*l.*, this legacy having been given free of duty so far as her life interest extended, and no further; and the revenue authorities having claimed and obtained an immediate payment of legacy duty on the capital sum. He assents, and, as far as I can see, rightly assents, to the view that this sum carries interest in favour of the successive owners of residue only as from the time when it comes back to the estate, and accordingly he does not claim for his clients any adjustment in respect of it.

The terms of the declaration, I think, would be to this effect: That in respect of the payments for estate duty, legacies, debts, and so on the amount which will be chargeable against the tenants for life during the first year will be interest at 4 per cent. until the respective dates of payment on the various sums of capital which will, together with such interest, make up the various sums paid; and the costs will be as between solicitor and client out of the residue.

F. Whinney. I gather from your Lordship's judgment that it is unnecessary to interfere with the way in which the interest-bearing debts have been dealt with, namely, capital has been charged against capital, and interest against interest. The point is not referred to in the summons, but is raised by the evidence.

SARGANT J. I think that would substantially be the result.

Solicitors for plaintiffs and executors: *Russell-Cooke & Co.*

Solicitors for other defendants: *Biddle, Thorne, Welsford & Gait.*

F. E.

END OF VOL. II.

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ADMINISTRATION—*Insolvent Estate—Receiver—Executor Surety for Testator — Right of Indemnity—Right of Retainer.*

An executor, who is surety for an unpaid debt of his testator, cannot exercise his right of retainer in respect of his liability as surety unless he pays the debt, and then only to the extent of the assets actually in his hands at the time he pays it. But an opportunity may be given him to pay the debt, if he has assets in his hands, in order that he may set up his right of retainer.

After the usual judgment in a creditors' action to administer the estate of a testator a receiver was appointed. The estate proved to be insolvent. One of the executors, who was surety for an unpaid debt of 3000*l.* of the testator's, claimed that his right to indemnity out of the estate created an equitable debt which entitled him to retain in respect of it certain legal assets which constituted the greater part of the outstanding personal estate of the testator:—

Held, that as the executor had not paid the debt for which he was surety, there was no debt in respect of which he could exercise his right of retainer. The claim was therefore disallowed.

The principle of *In re Orme* (1883) 50 L. T. 51, and *In re Harrison* (1886) 32 Ch. D. 395, applied.

In re Giles [1896] 1 Ch. 956, not followed.

In re BEAVAN. DAVIES, BANKS & Co. *v.* BEAVAN – – – – **Neville J. 595**

2. —— *Lease by Testator—Covenant by Lessor—Specific Devise of Reversion — Liability for Performance after Lessor's Death.*

In 1901 the testator demised freehold premises used as pottery works to lessees for a term of fourteen years at a yearly rent of 120*l.*, and thereby covenanted with the lessees that he would, if required by the lessees during the term, build an additional oven and cone and shed and workshops according to the plan prepared by a named architect, the lessees paying an additional rent at the rate of 10*l.* per cent. per annum on the gross outlay of the lessor on the works, such additional rent to be computed from the date when the architect should certify in writing that the works had been completed. There was no actual plan in existence at the date of the lease, but shortly afterwards the architect prepared a plan and the workshops were erected by the testator, but disputes having arisen as to the proposed site of the other works, nothing further was then done. The testator died in 1909, having by his will, which was made in the same year, specifically devised the demised premises. In 1911 the lessee required the testator's executors to complete the works, and the disputes were referred to arbitration, and the arbitrator by his award required the executors to erect the works on part of the demised premises and to pay the costs of the award. On a summons raising the question whether the expenses of erecting the works and the costs of the arbitration were payable by the specific devisees in exoneration of the testator's general estate:—

Held, that the obligation imposed by the covenant was not one in its nature incident to the relation of landlord and tenant, but was preparatory to the complete establishment of that relation, and therefore, according to the law stated in *Eccles* v. *Mills* [1898] A. C. 360, was one which, as between the specific devisees of the reversion and the general estate, ought to be primarily borne by the general estate. *In re* HUGHES. ELLIS *v.* HUGHES
Warrington J. 491

3. —— *Life Tenant of Residue — Debts — Legacies—Estate Duty—Legacy Duty—Adjustment of Accounts between Tenant for Life and Remainderman.*

The rule laid down in *Allhusen* v. *Whittell* (1867) L. R. 4 Eq. 295,—that in adjusting the accounts between the tenant for life of the

ADMINISTRATION—*continued.*

residuary estate of a testator and the remainderman the executors must be taken to have paid the debts and legacies not out of capital only or out of income only, but with such portion of the capital as, together with the income of that portion for one year from the testator's death, was sufficient for the purpose—although it worked perfectly in that case and works equally well in any case where the capital subtracted from the gross estate before the ascertainment of residue is not subtracted before the end of the first year from the testator's death, is not to be slavishly followed in every administration where residue is settled, and is inapplicable in hard and fast terms to a case where the subtractions from the estate occur at periods substantially anterior to the close of the first year.

Allhusen v. *Whittell* was founded on *Holgate* v. *Jennings* (1857) 24 Beav. 623, and did not enlarge the principle of that case, which was that the intermediate income of what is eaten up by payment of debts, &c., before the ascertainment of residue, cannot itself be income of residue or payable as such to a tenant for life of residue.

Observations on *Lambert* v. *Lambert* (1873) L. R. 16 Eq. 320.

A testator died on February 6, 1911, having by his will given legacies to be paid free of all duty, and given his residuary estate as to each of four fifths thereof in trust for one of certain persons for life, with remainder to his or her children. The executors paid the estate duty, legacy duty, legacies and debts at various dates during the year immediately succeeding the testator's death, for instance, over 47,000*l.* for estate duty on April 1, 1911, legacy duty of 1370*l.* on July 1, 1911, legacies of about 14,000*l.* in June and July, and debts and funeral expenses amounting to nearly 600*l.* in May, 1911:—

Held, (1.) that the equitable bookkeeping or mode of adjustment to be adopted, on taking the account of the share of income during the year succeeding the testator's death due to the tenants for life, was that there should be charged against them, in respect of the payments for estate duty, debts, funeral and testamentary expenses, and duty on legacies given free of duty, interest upon the capital sum which would, with such interest, make up the sums paid in respect of estate duty, &c., such interest being calculated only during the respective periods from the death of the testator until the respective times when the sums paid for estate duty, &c., were in fact paid; and (2.) that the method of adjustment adopted in this particular case was not the only method available, and that extremely elaborate and minute calculations need not be gone through, in every case. *In re* McEuen. McEuen *v.* Phelps – – – – **Sargant J. 704**

4. —— *Will—Legacy on Release of Annuity under a Settlement—Deficiency of Assets — Abatement.*

W. by settlements declared that moneys paid by him to the trustees of an orphanage should be held by them upon trust for investment and to pay 5 per cent. per annum on the invested capital

ADMINISTRATION—*continued.*

to him for life, and after his death to his maidservant S. for life, and after the death of the survivor, upon trust to pay the capital and the income to the treasurer for the time being of the orphanage. By his will, W. gave 1000*l.* to S. on condition that she released the trustees from all claims to income under the settlement and accepted the legacy in place thereof. The estate of the testator was insufficient to pay all the legacies thereby given in full:—

Held, that if S. elected to take the legacy it would abate with the other legacies and not be entitled to priority over them.

Observations on *Davies* v. *Bush* (1831) You. 341, and *In re Wedmore* [1907] 2 Ch. 277.

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BUILDING—*Injunction—Breach of Covenant—Building Scheme—Alteration in Character of District.*

In 1888, S., the owner of a considerable estate called the B. M. Estate, lying on the south side only of C. Road, conveyed to a building society three acres of the land bounded by C. Road on the north (below called the second S. Estate). The land was coloured pink on the plan on the conveyance, which divided it by lines into eighteen equal-sized plots having the odd numbers on the C. Road frontage and the even numbers on the south. The plan also shewed another piece of land coloured green, which belonged to S. but was not conveyed. The deed contained a covenant by the society against the erection or user of buildings on the second S. Estate other than as private dwelling-houses, professional premises, or lodging-houses. S. by the same deed entered into a similar restrictive covenant as regarded the land coloured green. Other parts of the B. M. Estate lying to the west and south-west of the second S. Estate (below called the first S. Estate) had been previously purchased by the society, which later on purchased other land forming part of the B. M. Estate, including the land coloured green (collectively called the third S. Estate).

In 1889 the society conveyed a plot on the second S. Estate (No. 11, facing north) and another plot (No. 12, facing south) to G., who in 1912 conveyed them both to the defendant. The unsold portions of the B. M. Estate were in 1911 conveyed by the successor in title of S. to the plaintiff.

In and for some time after 1888 C. Road was a quiet country road with a few houses on either side, and for some distance west of the second S. Estate, and along the whole frontage of that estate and of the land coloured green the district was purely residential. From 1888 onwards this character had been seriously altered. On the north side of C. Road there was an almost continuous line of shops opposite the second S. Estate, and C. Road itself had become the main shopping district of the place. Many shops had also been built on adjoining parts of the B. M. Estate which had formerly been subject to restrictive covenants, and the covenants in respect of several plots on the second S. Estate had not been enforced, with the result that private houses on them had been turned into shops. The plaintiff himself had erected shops on parts of his neighbouring land.

In 1912 the defendant, being desirous of building shops on his plots, applied to the plaintiff for leave to do so. This was refused except on the terms of the defendant paying plaintiff 100*l*. On these terms being declined the plaintiff sued for an injunction to restrain the defendant from erecting the shops:—

Held, (1.) that as between S. and the society the conveyance provided for a building scheme; (2.) that the acts and omissions of the plaintiff and his predecessors in title, and particularly the non-enforcement of the covenant as to the building on parts of the second S. Estate, prevented the Court from enforcing the covenant; and (3.) that, if that was not enough, the Court was entitled also to take into account the general change in the character of the neighbourhood irrespective of the particular acts and omissions of the plaintiff and his predecessors in title.

Observations of James L.J. in *German* v. *Chapman* (1877) 7 Ch. D. 271, 279, and of Lindley L.J. in *Knight* v. *Simmonds* [1896] 2 Ch. 294, 297, 298, applied. SOBEY *v.* SAINSBURY – – – – – **Sargant J. 513**

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BURIAL GROUND — *Building upon Disused Burial Ground—Sale or Disposition "under the authority of any Act of Parliament"—Sale under Order of the Charity Commissioners—Disused Burial Grounds Act*, 1884 (47 & 48 *Vict. c.* 72), *ss.* 3, 5—*Charitable Trusts Act*, 1853 (16 & 17 *Vict. c.* 137), *s.* 24—*Charitable Trusts Amendment Act*, 1855 (18 & 19 *Vict. c.* 124), *s.* 29.

Trustees of a disused Congregational chapel and burial ground attached were desirous of selling them together as a building site, and had applied to the Charity Commissioners for an order sanctioning the sale. The Charity Commissioners were willing to make the order if the Court would declare that such a sale would be "a sale under the authority of any Act of Parliament" within the meaning of the Disused Burial Grounds Act, 1884, and so exempt from the prohibition of building in that Act:—

Held, that the proposed sale under the order of the Charity Commissioners would not be "a sale or disposition under the authority of any Act of Parliament" within the meaning of s. 5 of the Disused Burial Grounds Act, 1884.

Semble, those words only apply where the Act is expressly or by necessary implication the authority which makes the sale effectual as regards the land itself. *In re* HOWARD STREET CONGREGATIONAL CHAPEL, SHEFFIELD
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—— *Armitage, In re* – [1893] 3 Ch. 337
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—— *Attorney-General* v. *Horner* (1884) 14 Q. B. D. 245; (1885) 11 App. Cas. 66.
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—— *Bennett, In re* – [1896] 1 Ch. 778, 787
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—— *Bruner* v. *Moore* – [1904] 1 Ch. 305, 312
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—— *Lamb* v. *Evans* – [1893] 1 Ch. 218, 236
Certain observations in, were not addressed to the case of a secret process. AMBER SIZE AND CHEMICAL COMPANY, LIMITED *v.* MENZEL
[1913] 2 Ch. 239

—— *Lambert* v. *Lambert* (1873) L. R. 16 Eq. 320
Observations on. *In re* MCEUEN. MCEUEN *v.* PHELPS [1913] 2 Ch. 704

CASES—*continued.*

—— *Lawford* v. *Billericay Rural Council* [1903] 1 K. B. 772.
The principle of, applied. DOUGLASS *v.* RHYL URBAN COUNCIL
[1913] 2 Ch. 407

—— *Leslie* v. *Leslie* (1835) Ll. & G. t. Sug. 1, 3
See In re WEST. WESTHEAD *v.* ASPLAND – – [1913] 2 Ch. 345

—— *Life and Health Assurance Association, Ld., In re Berry's Claim.* (Reported as a note [1913] 2 Ch. 103, at p. 137.)
The opinion of the Lord Ordinary (Lord Cullen) in the Court of Session in Scotland in, approved. *In re* LAW CAR AND GENERAL INSURANCE CORPORATION. J. J. KING & SONS' (LIMITED) CASE. OLD SILKSTONE COLLIERIES' (LIMITED) CASE
[1913] 2 Ch. 103

—— *Louis* v. *Smellie* [1895] W. N. 115; 73 L. T. 226, 228.
Certain observations in, were not addressed to the case of a secret process. AMBER SIZE AND CHEMICAL COMPANY, LIMITED *v.* MENZEL
[1913] 2 Ch. 239

—— *Luxford* v. *Cheeke* – (1684) 3 Lev. 125
The principle of, applied. *In re* SEATON. ELLIS *v.* SEATON
[1913] 2 Ch. 614

—— *Macfarlane's Claim* (1880) 17 Ch. D. 337
The principle of, not adopted. *In re* LAW CAR AND GENERAL INSURANCE CORPORATION. J. J. KING & SONS' (LIMITED) CASE. OLD SILKSTONE COLLIERIES' (LIMITED) CASE
[1913] 2 Ch. 103

—— *Marke Wood, In re, Wodehouse* v. *Wood* [1913] 1 Ch. 303.
Affirmed – – [1913] 2 Ch. 574

—— *Marman's Trusts, In re* (1878) 26 W. R. 621
Followed. *In re* BENNETT. GREENWOOD *v.* BENNETT - [1913] 2 Ch. 318

—— *Measures Brothers, Ld.* v. *Measures* [1910] 1 Ch. 336, 346.
Certain observations in, were not addressed to the case of a secret process. AMBER SIZE AND CHEMICAL COMPANY, LIMITED *v.* MENZEL
[1913] 2 Ch. 239

—— *Merryweather* v. *Moore* [1892] 2 Ch. 518, 524.
Certain observations in, were not addressed to the case of a secret process. AMBER SIZE AND CHEMICAL COMPANY, LIMITED *v.* MENZEL
[1913] 2 Ch. 239

—— *Middleton* v. *Pollock* – (1876) 2 Ch. D. 104
Explained. *In re* COZENS. GREEN *v.* BRISLEY – – [1913] 2 Ch. 478

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—— *Morison* v. *Moat* – (1851) 9 Hare, 241
Applied. AMBER SIZE AND CHEMICAL COMPANY, LIMITED *v.* MENZEL
[1913] 2 Ch. 239

—— *New York Taxicab Co., In re* [1913] 1 Ch. 1
Distinguished. *In re* TILT COVE COPPER COMPANY, LIMITED. TRUSTEES, EXECUTORS AND SECURITIES INSURANCE CORPORATION, LIMITED *v.* THE COMPANY – [1913] 2 Ch. 588

—— *Newbery* v. *James* – (1817) 2 Mer. 446, 451
Distinguished. AMBER SIZE AND CHEMICAL COMPANY, LIMITED *v.* MENZEL – – [1913] 2 Ch. 239

—— *North, In re* – – (1897) 76 L. T. 186
Observations on. *In re* FRASER. IND *v.* FRASER – – [1913] 2 Ch. 224

—— *Orme, In re* – – (1883) 50 L. T. 51
The principle of, applied. *In re* BEAVAN. DAVIES, BANKS & Co. *v.* BEAVAN – – [1913] 2 Ch. 595

—— *Perkins, In re* (1892) 67 L. T. 743; 41 W. R. 170.
Observations on. *In re* FRASER. IND *v.* FRASER – [1913] 2 Ch. 224

—— *Pett* v. *Fellows* (1733) 1 Swans. 561, n., as explained by Sugden L.C. in *Leslie* v. *Leslie* (1835) Ll. & G. t. Sug. 1, 3.
Distinguished. *In re* WEST. WESTHEAD *v.* ASPLAND – [1913] 2 Ch. 345

—— *Robb* v. *Green* – – [1895] 2 Q. B. 1, 315
Applied. AMBER SIZE AND CHEMICAL COMPANY, LIMITED *v.* MENZEL
[1913] 2 Ch. 239

—— *Roberts* v. *Walker* (1830) 1 Russ. & My. 752.
Referred to. *In re* SMITH. SMITH *v.* SMITH – – – [1913] 2 Ch. 216

—— *Sadgrove* v. *Kirby* – (1795) 6 T. R. 483
The principle of, applied. HOPE *v.* OSBORNE – – [1913] 2 Ch. 349

—— *Sadler* v. *Pratt* – – (1833) 5 Sim. 632
The law on the point was settled by, and was no longer open to discussion. *In re* WITTY. WRIGHT *v.* ROBINSON
[1913] 2 Ch. 666

—— *Shaw* v. *Smith* – (1886) 18 Q. B. D. 193
Applied. BIRCHAL *v.* BIRCH, CRISP & Co. – – – [1913] 2 Ch. 375

—— *Shelley's Case* – – (1581) 1 Rep. 93b
Rule in, applicable. *In re* DAVISON'S SETTLEMENT. CATTERMOLE DAVISON *v.* MUNBY – – [1913] 2 Ch. 498

—— *Stephens, In re* – (1889) 43 Ch. D. 39, 45
Query raised by Kay J. in, answered in the negative.
In re RAGGI. BRASS *v.* H. YOUNG & Co., LIMITED – [1913] 2 Ch. 206

CASES—*continued.*

—— *Stokes* v. *Clendon* – (1790) 3 Swans. 150, n.
Followed. GEE *v.* LIDDELL
[**1913**] **2 Ch. 62**

—— *Sykes* v. *Sowerby Urban Council* [1900] 1 Q. B. 584.
Followed. PHILLIMORE *v.* WATFORD RURAL DISTRICT COUNCIL
[**1913**] **2 Ch. 434**

—— *Taylor's Trusts, In re* – [1905] 1 Ch. 734
Followed and applied. *In re* SALE. NISBET *v.* PHILP – [**1913**] **2 Ch. 697**

—— *Teofani & Co., Limited* v. *A. Teofani; In re Teofani & Co.'s Trade Mark* [1913] 1 Ch. 191.
Reversed on one point. Injunction rightly granted – [**1913**] **2 Ch. 545**

—— *Thornhill* v. *Weeks* – [1913] 1 Ch. 438
See THORNHILL *v.* WEEKS (No. 2)
[**1913**] **2 Ch. 464**

—— *Tuck & Sons* v. *Priester* (1887) 19 Q. B. D. 629.
Applied. AMBER SIZE AND CHEMICAL COMPANY, LIMITED *v.* MENZEL
[**1913**] **2 Ch. 239**

—— *Turner* v. *Moon* – – [1901] 2 Ch. 825
Followed. EASTWOOD *v.* ASHTON
[**1913**] **2 Ch. 39**

—— *Turner v. Wright* – (1860) 2 D. F. & J. 234
Followed. *In re* HANBURY'S SETTLED ESTATES – – [**1913**] **2 Ch. 357**

—— *Way, In re* (1861) 30 L. J. (Ch.) 815; 3 D. F. & J. 175.
Followed. *In re* BENNETT. GREENWOOD *v.* BENNETT – [**1913**] **2 Ch. 318**

—— *Wedmore, In re* – [1907] 2 Ch. 277
Observations on. *In re* WHITEHEAD. WHITEHEAD *v.* STREET
[**1913**] **2 Ch. 56**

CHARGE—Company—Charge to secure future advances—Creation of charge—Charge by deposit—Registration – – **366**
See COMPANY. 1.

—— Mortgages.
See under MORTGAGE.

—— Will.
See under WILL.

CHARITY—*Bequest to Queen's College, Belfast, to found Scholarship—Dissolution of College and Incorporation of Queen's University of Belfast before Date of Will — Legatee, whether sufficiently described—Irish Universities Act,* 1908 (8 *Edw.* 7, *c.* 38).

Testatrix, by her will dated February 16, 1910, bequeathed 3000*l.* to "Queen's College, Belfast," to found a "Magrath Clinical Scholarship for proficiency in reports of cases at the bedside and to be open to medical students of the fourth year who shall be bona fide students at such college." On October 31, 1909, "Queen's College, Belfast," had been dissolved under the provisions of the Irish Universities Act, 1908, and by virtue of a charter under the same Act the "Queen's University of Belfast" had been incorporated, and at the date of the will and the death was carrying on substantially the same work in the same place as the former body. There was no evidence whether the testatrix was or was not aware of the dissolution of "Queen's College, Belfast," or of the incorporation of the "Queen's University of Belfast":—

Held, that for all practical purposes connected with the legacy the two institutions were identical; that under the circumstances (the case being treated as one of misdescription of the legatee) the "Queen's University of Belfast" was sufficiently referred to by the words of the will; and that the legacy took effect in its favour.

Coldwell v. *Holme* (1854) 2 Sm. & Giff. 31, followed.

In re MAGRATH. HISTED *v.* QUEEN'S UNIVERSITY OF BELFAST **Warrington J. 331**

2. —— *Endowment for a "Sermon" once a Year — Increase in the Income—Cyprès — Religious Purposes—Trustees—Scheme.*

By a deed of 1580 land was assured to trustees to the intent that the rents should be employed for or towards the charges of a sermon once every year to be made in the parish church of West Ham. The rents had largely increased, and by an order made in 1912 by Parker J. in this action it was declared that such part of the income as was not required for payment for the sermon ought to be applied cyprès the objects of the gift for the sermon. The old parish of West Ham was conterminous with the present borough, containing some 300,000 inhabitants. This area was now divided into nineteen ecclesiastical parishes, of which the parish served by the old parish church, containing some 25,000 inhabitants, was one. On a summons taken out to determine the principles upon which the scheme should proceed:—

Held, that the charity was religious in its object and that no part of the income ought to be applied for a non-religious purpose, such as lectures in the town hall for the moral or intellectual improvement of the inhabitants or in aid of a public library; but that the whole income might properly be applied in or towards payment of the stipends of one or more assistant curates to serve in the church and parish, and subject thereto in or towards the expenses incurred by the vicar in providing for the services of the church, the visitation of the poor, or the religious instruction of the inhabitants, including children and young persons.

Held, also, that the scheme ought to be confined to the parish served by the old parish church of West Ham.

Held, also, that the vicar and churchwardens and persons to be appointed by them and by the bishop of the diocese were proper persons to be appointed trustees, but that the mayor of West Ham or the overseers or persons to be appointed by the borough council ought not to be appointed.

CHARITY—*continued.*

Held, also, that there was no objection to the vicar of the parish himself preaching the annual sermon and receiving a proposed fee of ten guineas therefor. *In re* AVENON'S CHARITY. ATTORNEY-GENERAL *v.* PELLY
Warrington J. 261

CHARITY COMMISSIONERS—Sale under order of the—Disused burial ground—Sale or disposition "under the authority of any Act of Parliament" - - **690**
See BURIAL GROUND.

"CHILDREN"—Gift to—Exclusion of illegitimate children—Will—Construction
See WILL. 5. **674**

CO-DEFENDANTS—Discovery as between co-defendants—Rights to be adjusted between the parties—Practice - **375**
See PRACTICE. 2.

CODICIL—Will—Construction - - **1**
See WILL. 4.

COMMON — *Rights of Common — Trespass by Commoner—Serious Injury to Waste—Suit by Fellow Commoner—Injunction.*

One commoner can maintain an action against a fellow commoner for wrongful acts by which the former's right of common is destroyed or interfered with, or which unless stopped would grow into a legal right to the prejudice of the rights of common of the other commoners.

The defendants, who were only entitled to have common of pasture for their cattle levant and couchant over the waste of the manor, were carting goods and refuse to and from their tenement over, and depositing refuse on, a part of the waste of the manor, and admittedly intended to acquire a right of way by prescription :—

Held, that they could be restrained by injunction at the suit of a fellow commoner, and that he need not prove actual pecuniary damage. KING *v.* BROWN, DURANT & CO. - **Joyce J. 416**

—— Manor — Rights of common — Turbary—Estovers — Nuisance — Abatement — Excessive trespass—Cutting down trees —Injunction—Damages - - **349**
See MANOR.

COMPANIES (WINDING-UP) RULES, 1909, r. 80 - - - - - **81**
See INSURANCE COMPANY. 1.

COMPANY—*Charge to secure Future Advances — Creation of Charge — Charge by Deposit — Registration — Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *s.* 93.

The date of the creation of a mortgage or charge by a company (within twenty-one days after which registration is required by s. 93 of the Companies (Consolidation) Act, 1908) is the date when the instrument of mortgage or charge is executed and not the date when any money is subsequently advanced on it.

In September, 1910, a company deposited with a bank certain title deeds of landed

COMPANY—*continued.*

property, and a sealed but undated memorandum of charge to secure future advances, which were from time to time subsequently made by the bank. On June 14, 1911, the manager of the bank filled in that date, and on July 3, 1911, the memorandum was, for the first time, registered with the Registrar of Joint Stock Companies. The company subsequently went into winding-up :—

Held, that the transaction was void, as a security, against the liquidator and creditors of the company, for want of registration in due time under s. 93 of the Act. ESBERGER & SON, LIMITED *v.* CAPITAL AND COUNTIES BANK
Sargant J. 366

2. —— *Debenture-holders—Reserve Fund—Proposed Distribution amongst Shareholders—No Default under Debentures—Jeopardy—Receiver.*

In 1888 a company under the powers of its memorandum and articles of association acquired certain mines, and created a debenture issue of 80,000*l.* which was a floating charge in common form protected by the usual trust deed. In 1912 the mines were worked out ; the land, plant, and machinery at the mines were worthless ; the company's issued share capital was exhausted ; and practically its only asset was a reserve fund of 10,000*l.*, representing accumulated profits, which the company proposed to distribute amongst its shareholders.

The debenture interest had been regularly paid, and no event had happened which either under the provisions of the debentures or of the trust deed entitled the debenture-holders to enforce their security :—

Held, that the case came within the principle of jeopardy, and that the debenture-holders were entitled to have a receiver appointed.

In re New York Taxicab Co. [1913] 1 Ch. 1, distinguished. *In re* TILT COVE COPPER COMPANY, LIMITED. TRUSTEES, EXECUTORS, AND SECURITIES INSURANCE CORPORATION, LIMITED *v.* THE COMPANY - **Neville J. 588**

3. —— *Receiver and Manager—Appointment by Debenture-holders—Notice of Preferential Claim — Subsequent Payments to Ordinary Creditors in carrying on Business—Loss of Assets — Liability to Preferential Creditor—Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *s.* 107.

A receiver and manager appointed by debenture-holders, who, after notice of any claim that is preferential under s. 107 of the Companies (Consolidation) Act, 1908, pays away the company's assets to ordinary creditors in the process of carrying on the company's business without making or attempting to make any provision for that preferential claim, is guilty of a breach of that section and is liable in damages accordingly. WOODS *v.* WINSKILL
Astbury J. 303

4. —— *Voluntary Liquidation—Unsuccessful Litigation—Costs—Priorities—Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *s.* 193.

Costs of unsuccessful litigation incurred by a liquidator, whether in a voluntary or compulsory

COMPANY—*continued.*

winding-up, are payable to the party entitled out of the assets of the company in priority to the costs of the liquidation. This rule applies whether the order simply directs payment of costs, or directs that the costs be paid out of the assets of the company, or that the liquidator do pay the costs with liberty to recoup himself out of the assets. *In re* PACIFIC COAST SYNDICATE, LIMITED - - - - **Neville J. 26**

5. —— *Winding-up—Preferential Claims—Director—"Servants"—Articles of Association—Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *s.* 209, *sub-s.* 1 (*b*).

The articles of a company that published a weekly periodical provided that no director should be disqualified by his office from contracting with or being employed by the company in the capacity of contributor, editor, or otherwise; and that a director might hold any other office or place under the company in conjunction with his office of director.

R. was a director of the company and was also appointed "dress editress" of the periodical at a fixed salary per annum, and her duties occupied practically the whole of her time. H. was employed by the company at a fixed salary per annum to supply "fashion drawings" for the periodical, and the company had the first call on her services and her work occupied most of her time, but occasionally she did work for other publishers. P. was employed by the company at a fixed salary per annum to supply weekly articles and other information for the periodical, but she also wrote for other publishers. R., H., and P. claimed to be preferential creditors of the company for arrears of salary due to them respectively at the commencement of the winding-up:—

Held, having regard to the articles of the company, that R.'s office of director did not preclude her employment in any other capacity; that she was a "clerk or servant" of the company within the meaning of sub-s. 1 (*b*) of s. 209 of the Companies (Consolidation) Act, 1908, and was therefore entitled to preferential payment.

But *held* that H. and P. were merely contributors to the periodical and not "clerks or servants" of the company within the meaning of the section, and were therefore not entitled to preferential payment. *In re* BEETON & Co., LIMITED - - - - **Neville J. 279**

—— Debenture — Priority — Construction — Floating charge—Specific mortgage subject to provisions of first security **201**
See MORTGAGE. 1.

—— Insurance company.
See under INSURANCE COMPANY.

—— Insurance of debentures—Re-insurance—Contract of indemnity—Liquidation—Scheme of arrangement — Limit of liability of re-insurer - - - **604**
See INSURANCE OF DEBENTURES.

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—— Insurance of mortgage owned by a company — Condition — Policy — Insured company in liquidation—Power of liquidator to assign - - - - - **34**
See INSURANCE.

—— Mining partnership of two—"Company"—Winding-up—Jurisdiction—High Court—County court - - - - **530**
See STANNARIES.

—— Tenant for life and remainderman—Preference shares—Death of tenant for life—Future dividends - - **697**
See SETTLED ESTATE.

COMPENSATION—Building in street—Payment or tender—Refusal to set back—Mandatory injunction to pull down - **444**
See STREETS.

COMPTROLLER-GENERAL — Appeal from — Trade mark—Application for registration—Grounds of objection - **291**
See TRADE MARK. 1.

CONDITION — Policy—Insurance of mortgage owned by a company—Insured company in liquidation—Power of liquidator to assign - - - - - **34**
See INSURANCE.

CONSIDERATION—Corporation—Contract not under seal—Executed consideration—Contract to pay implied from acceptance of benefit—Improvement Commissioners—Special Act - - **407**
See CORPORATION.

CONTINGENT CLASS—Will — Appointment—Excessive exercise — Objects — Non-objects — Ascertainment at future period - - - - - **666**
See WILL. 1.

CONTINGENT LIABILITIES—Insurance company—Winding-up—Current policies—Employers' liability policies—Contingent claims maturing after winding-up order—Proofs—"Valuing a policy"—Breach of contract — Measure of damages - - - - - **103**
See INSURANCE COMPANY. 3.

CONTRACT—Corporation—Contract not under seal — Executed consideration — Contract to pay implied from acceptance of benefit — Improvement Commissioners - - - - - **407**
See CORPORATION.

—— Frauds, Statute of.
See under FRAUDS, STATUTE OF.

—— Indemnity.
See under INDEMNITY.

—— Insurance company—Winding-up—Proofs—"Valuing a policy"—Breach of contract—Measure of damages - **103**
See INSURANCE COMPANY. 3.

CONTRIBUTORY—Company limited by guarantee and not having its capital divided into shares — Winding-up — Contributories - - - - - **29, 81**
See INSURANCE COMPANY. 1, 2.

CONVERSION—*Postponement—Tenant for Life and Remainderman—Will—Trust for Conversion—Power to postpone—Residue—Estate pur autre vie—Policies on Life of Cestui que vie—Premiums, whether payable out of Capital.*

Testator devised and bequeathed his residuary real and personal estate to trustees upon trust to sell and convert and to pay the income of the proceeds to his wife for life or during widowhood and after her death or remarriage to divide his estate into six equal parts which he settled upon his six children for life with remainder to their respective children absolutely with power for his trustees to retain his estate in its then state of investment unless directed by his wife to sell and with a proviso that until such sale the income of his estate should be paid to the persons to whom the income of the proceeds of his residuary estate would for the time being be payable. The testator's estate included an estate pur autre vie in certain funds which produced about 244*l.* a year and two policies of assurance for 1000*l.* and 750*l.* respectively, the annual premiums on which amounted to about 60*l.* The cestui que vie had disappeared some years ago and his whereabouts was not known :—

Held, that the trustees were entitled to postpone the sale both of the life interest and the policies, and that the premiums on the policies were payable out of capital.

In re Bennett [1896] 1 Ch. 778, 787, followed. *In re* SHERRY. SHERRY *v.* SHERRY
Warrington J. 508

—— Settlement — Omission of words of limitation — Equitable estate in freehold and copyhold property—Estate for life of trustee—Trust for conversion - **636**
See SETTLEMENT. 4.

CONVEYANCE—Construction—Express or implied grant — Agricultural ditch — Sewage farm—Nuisance—Discharge of sewage on private land—Smell—Injunction—Damages - - - **434**
See SEWERS.

CONVEYANCING AND LAW OF PROPERTY—Mortgage—Foreclosure proceedings—Licence by mortgagees to work peat—Jurisdiction of Court to sanction **96**
See MORTGAGE. 4.

—— Vendor and purchaser—Omission to prevent acquisition of title under Statute of Limitations—Liability of vendor—Measure of damages - - - **39**
See VENDOR AND PURCHASER.

COPIES — Documents—Injunction—Privilege—Restraint of publication — Documents improperly obtained — Secondary evidence - - - - - - **469**
See INJUNCTION.

COPYHOLD—Settlement—Omission of words of limitation—Equitable estate in freehold and copyhold property—Estate for life of trustee—Trust for conversion - **636**
See SETTLEMENT. 4.

CORPORATION — *Contract not under Seal — Executed Consideration—Work done at Request of Corporation necessary for Purpose for which Corporation was created—Contract to pay implied from Acceptance of Benefit—Improvement Commissioners—Special Act—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 174.

The defendants as the successors of the Rhyl Improvement Commissioners, who were constituted a body corporate with a common seal by the Rhyl Improvement Act, 1852, with which was incorporated the Commissioners Clauses Act, 1847, were proposing to buy, repair, and extend the Rhyl pier under special powers in the Rhyl Improvement Acts, and definitely employed the plaintiff, an engineer and expert in pier and harbour work, to make a certain valuation and estimates required by the Local Government Board, to which body the defendants, under powers in their special Acts, had applied for sanction to borrow the money necessary for the proposed scheme. There was no contract under the seal of the defendants relative to the employment of the plaintiff, but he made the valuation and estimates of which the defendants had the benefit and made use. Ultimately the scheme was not proceeded with. In an action by the plaintiff to recover his fees :—

Held, that the provisions of s. 174 of the Public Health Act, 1875, did not apply to the contract in question ; that in the circumstances the principle of the decision in *Lawford* v. *Billericay Rural Council* [1903] 1 K. B. 772, applied ; and that the plaintiff was entitled to payment upon a quantum meruit. DOUGLASS *v.* RHYL URBAN DISTRICT COUNCIL
Joyce J. 407

COSTS — Company — Voluntary liquidation — Unsuccessful litigation—Costs—Priorities - - - - - - - **26**
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—— Conveyance—Parcels—Plan—Falsa demonstratio - - - - - - - **39**
See VENDOR AND PURCHASER.

—— Lands Clauses Acts—Settled land — Separate appearance of tenant for life **326**
See LANDS CLAUSES ACTS.

COUNTY COURT—"Company"—Winding-up—Jurisdiction — Mining partnership of two - - - - - - - **530**
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COURT OF PROBATE ACT, 1857, ss. 75, 77, 78
See PROBATE. **384**

COVENANT—After-acquired property, Covenant to settle—Estate duty - - - **623**
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—— After-acquired property, Covenant to settle — Hotchpot clause — Settled funds — Trusts by reference - - - **224**
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—— Building scheme — Breach of covenant — Alteration in character of district 513
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—— Lease by testator — Covenant by lessor— Specific devise of reversion—Liability for performance after lessor's death 491
See ADMINISTRATION. 2.

—— Title, Implied covenants for—Conveyance —Damages - - - - - 39
See VENDOR AND PURCHASER.

CYPRÈS—Charity—Endowment for a "sermon" once a year—Increase in the income—Religious purposes — Trustees—Scheme
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DAMAGES—Ancient lights — Obstruction — No damage—Negative easement - 421
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—— Common, Rights of—Turbary—Estovers— Nuisance—Abatement—Excessive trespass—Cutting down trees—Injunction
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DEATH—Lunatic—Moneys in hands of committee representing unapplied surplus income—Claim by daughters - 318
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DEBENTURE-HOLDERS AND DEBENTURES —Company.
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DEBENTURES—Company.
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DEBTS — Administration — Adjustment of accounts between tenant for life and remainderman - - - - 704
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—— Will—Charge of legacies and debts on specific realty and personalty in foreign country — Mixed fund — Non-exoneration of residuary personalty - 216
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—— Will—Residuary devise and bequest— Trust to pay debts out of mixed fund— Debt, whether barred against personal but not against real estate - - 206
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DECLARATION OF TRUST—Breach of trust— Appropriation of security by defaulting trustee to meet breach of trust—Irrevocable declaration - - - 478
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DETERMINABLE LIFE INTEREST—Will— Construction - - - - 614
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DISUSED BURIAL GROUNDS ACT, 1884, ss. 3, 5
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DITCH—Agricultural ditch — Sewage farm— Nuisance — Discharge of sewage on private land — Smell — Injunction — Damages - - - - - 434
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DIVIDENDS—Tenant for life and remainderman —Preference shares — Death of life tenant—Future dividends—Apportionment - - - - - 697
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DOCUMENTS—Discovery.
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—— Injunction — Privilege — Restraint of publication — Documents improperly obtained—Secondary evidence—Copies
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DRAINS.
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DUTY—Inland Revenue.
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EASEMENT—Light and air.
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—— Market — Extension of—Charter days—Presumption of lost grant—Dedication subject to obstruction—Private market—Tolls – – – – – 140
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ECCLESIASTICAL LAW—Charity—Endowment for a "sermon" once a year—Increase in the income—Cyprès—Religious purposes—Trustees—Scheme – – 261
See CHARITY. 2.

ELECTRIC LIGHT — *Injunction — Electric Lighting—Connecting Two Areas of Supply—Connection already existing—London Electric Supply Act*, 1908 (8 *Edw* 7, *c. clxvii.*), *s.* 4, *sub-s.* 2.

Motion by the plaintiffs (who were the highway authority for the metropolitan borough of Battersea) for an injunction to restrain the defendants, who were "an authorized undertaker" within the London Electric Supply Act, 1908, from laying electric mains in any street or place within the plaintiffs' borough in order to connect two areas (Wandsworth and Southwark) which the defendants were authorized to supply with electrical energy. The injunction was asked for on the ground that those two areas were (and had for many years been) already connected.

Sect. 4, sub-s. 2, of the London Electric Supply Act, 1908, provides that "an authorised undertaker . . . . may . . . . by means of electric mains make a connection between any two or more areas which that authorised undertaker . . . . is authorised to supply . . . . ":—

Held, affirming the decision of Joyce J., that the section did not authorize one connection only, but that connections might be made between two areas from time to time as required. BATTERSEA BOROUGH COUNCIL *v.* COUNTY OF LONDON ELECTRIC SUPPLY COMPANY, LIMITED – – – – – C. A. 248

EMPLOYER AND WORKMAN—Trade secret—Secret process—Confidential employment—Implied obligation of servant
See MASTER AND SERVANT. 239

EMPLOYERS' LIABILITY—Insurance company — Winding-up — Current policies — Employers' liability policies—Contingent liabilities — Contingent claims maturing after winding-up order—Proofs—"Valuing a policy"—Breach of contract—Measure of damages 103
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EQUITABLE MORTGAGE.
See MORTGAGE.

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See under REVENUE.

ESTATE PUR AUTRE VIE—Policies on life of cestui que vie — Premiums, whether payable out of capital – – 508
See CONVERSION.

ESTOVERS—Rights of common — Turbary—Nuisance—Abatement—Excessive trespass—Cutting down trees—Injunction—Damages – – – – 349
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EVIDENCE — Injunction — Documents—Privilege—Restraint of publication—Documents improperly obtained—Secondary evidence—Copies – – – 469
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—— Market—Maps—Copies from Record Office
See MARKET. 140

EXECUTOR—Administration — Insolvent estate—Receiver—Executor surety for testator—Right of indemnity—Right of retainer
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—— Probate—Revocation—Supposed intestacy—Grant of letters of administration—Sale of real estate by administratrix—Subsequent discovery of will appointing executors — Invalidity of purchaser's title – – – – – – 384
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EXECUTORY GIFT—Merger—Tenancy for life and freehold reversion—Executory gift over—Conveyance of life estate—Intention – – – – – – 619
See MERGER.

—— Settled estate — Will — Construction — Tenant in fee with executory gift over—Mining lease—Quality of estate 357
See SETTLED LAND. 2.

EXONERATION — Will—Construction—Charge of legacies and debts on specific realty and personalty in foreign country—Mixed fund—Non-exoneration of residuary personalty – – – 216
See WILL. 2.

EXPECTANCY — Covenant to settle after-acquired property — "Interest in expectancy" – – – – 92
See SETTLEMENT. 2.

FALSA DEMONSTRATIO — Conveyance — Parcels—Plan – – – – 39
See VENDOR AND PURCHASER.

—— Will—Misdescription—Latent ambiguity
See WILL. 9. 488

FARM—Sewage farm—Nuisance—Discharge of sewage on private land—Smell—Agricultural ditch—Injunction—Damages
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FINANCE ACTS.
See under REVENUE.

FLOATING CHARGE—Mortgage—Debenture—Priority — Construction — Company—Specific mortgage subject to provisions of first security – – – – **201**
See MORTGAGE. 1.

FLOWER BOXES—Demise of first floor office—Right to fix flower boxes outside office windows—Trespass — Demise of both sides of outer wall – – – **312**
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FORECLOSURE—Mortgage.
See under MORTGAGE.

FOREIGN COUNTRY—Charge of legacies and debts on specific realty and personalty in—Will—Construction—Mixed fund—Non-exoneration of residuary personalty – – – – – **216**
See WILL. 2.

FRAUDS, STATUTE OF—*Sale of Land—Contract—Memorandum—Written Offer to purchase—Time for Acceptance limited—Acceptance out of Time—Subsequent Conduct—Implied Parol Agreement either to extend Time or to treat Acceptance as valid — Specific Performance—Vendor's Action—Term left open in Offer and Acceptance—Term solely in Vendor's Favour—Waiver by Vendor at the Bar—Statute of Frauds* (29 *Car.* 2, *c.* 3), *s.* 4.

Although a written offer to purchase land limits a definite time for acceptance, with a proviso withdrawing the offer if not accepted within that time, that time limit may nevertheless be extended by a parol agreement before it expires, or, if not so extended, the actual acceptance though out of time may by a parol agreement be treated as a valid acceptance, and in neither case is any memorandum of the parol agreement required by the Statute of Frauds.

Goss v. *Lord Nugent* (1833) 5 B. & Ad. 58, distinguished.

A parol agreement of either nature may be implied by the conduct of the parties subsequent to the actual acceptance.

Bruner v. *Moore* [1904] 1 Ch. 305, 312, applied.

A purchasers' offer provided that the purchase-money should be paid as to 250*l.* on completion and as to the balance within two years bearing interest at 5 per cent. and to be secured to the vendor's satisfaction.

The vendor accepted the offer subject to the purchase-money being secured to his satisfaction.

Two months before the date fixed for completion, and while the method of securing the balance of the purchase-money was still in negotiation, the purchasers withdrew their offer.

The vendor sued for specific performance or damages :—

Held, that the provision for securing the balance of the purchase-money to the vendor's satisfaction did not prevent the offer and acceptance from constituting a binding contract, and that in any case, as the provision was solely for the vendor's benefit, he could waive it at the Bar.

Hawksley v. *Outram* [1892] 3 Ch. 359, applied. MORRELL *v.* STUDD & MILLINGTON **Astbury J. 648**

—— Trustee—Breach of trust — Appropriation of security by defaulting trustee to meet breach of trust—Declaration of trust
See TRUSTEE. **478**

GRANT—Market—Charter days — By days—Streets subject to market rights—Presumption of lost grant—Easement — Dedication subject to obstruction **140**
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—— Sewage farm—Nuisance — Discharge of sewage on private land—Smell—Conveyance—Construction — Express or implied grant — Agricultural ditch — Injunction – – – – **434**
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GRANT OF ADMINISTRATION.
See under ADMINISTRATION.

GUARANTEE—Company limited by guarantee and not having its capital divided into shares—Winding-up—Contributories
See INSURANCE COMPANY. 1, 2. **29, 81**

"HEIR-AT-LAW" — Marriage settlement — Land — Limitation to settlor for life with ultimate limitation to his heir-at-law—Construction – – – **498**
See SETTLEMENT. 3.

HOTCHPOT—Provision for hotchpot—Supplying omission by inference—Will—Construction – – – – – **9**
See WILL. 6.

HOTCHPOT CLAUSE—Settled funds—Covenant to settle after-acquired property — Trusts by reference – – – **224**
See SETTLEMENT. 1.

—— Will — Settlement—Construction—Several settled funds—Trusts by reference **574**
See WILL. 7.

ILLEGITIMATE CHILDREN—Exclusion of—Will — Construction — Gift to "children" – – – – – **674**
See WILL. 5.

IMPROVEMENT COMMISSIONERS — Special Act—Corporation—Contract not under seal — Executed consideration — Contract to pay implied from acceptance of benefit – – – – – **407**
See CORPORATION.

INCOME—Will—Construction—Gift of income—Determinable life interest – **614**
See WILL. 3.

INDEMNITY—Administration—Insolvent estate —Receiver—Executor surety for testator —Right of indemnity — Right of retainer – – – – – 595
See ADMINISTRATION. 1.

—— Insurance of debentures—Re-insurance—Contract of indemnity—Liquidation—Scheme of arrangement — Limit of liability of re-insurer – – – 604
See INSURANCE OF DEBENTURES.

—— Mortgage—Foreclosure—Parties – 62
See MORTGAGE. 3.

INFERENCE—Will — Construction—Hotchpot, Provision for—Supplying omission by inference – – – – – 9
See WILL. 6.

INJUNCTION — *Documents — Privilege — Restraint of Publication—Documents improperly obtained—Secondary Evidence—Copies.*

It is no answer to an action brought for an injunction to restrain publication of copies of privileged documents to say that the copies, although improperly obtained, will be wanted in pending proceedings to prove the contents of the original documents, which, owing to the privilege, cannot be produced.

P. was a bankrupt and his discharge was opposed by, amongst others, the plaintiff. P. obtained by a trick letters which had been written by the plaintiff to his solicitor and were therefore privileged. P. had these letters copied and proposed to use them in the bankruptcy proceedings as secondary evidence of the contents of the letters which, owing to privilege, he could not produce. The plaintiff brought an action for an injunction to restrain P. from disclosing the letters or the copies, and Neville J. made an order restraining him from doing so except in the bankruptcy proceedings :—

Held, that the fact that the copies, although improperly obtained, might be admissible as secondary evidence in the bankruptcy proceedings, was no answer to the action, and that the plaintiff was entitled to an absolute injunction without any exception. LORD ASHBURTON *v.* PAPE – – – – – – C. A. 469

—— Building in street.
See under STREETS.

—— Building scheme — Breach of covenant—Alteration in character of district 513
See BUILDING.

—— Common, Rights of—Trespass by commoner — Serious injury to waste — Suit by fellow commoner – – – 416
See COMMON.

—— Common, Rights of—Turbary—Estovers—Nuisance—Abatement—Excessive trespass—Cutting down trees—Damages
See MANOR. 349

—— Electric lighting—Connecting two areas of supply—Connection already existing
See ELECTRIC LIGHT. 248

INJUNCTION—*continued.*

—— Master and servant—Trade secret—Secret process — Confidential employment — Implied obligation of servant—Secret process not disclosed to Court—Power of Court to grant injunction – 239
See MASTER AND SERVANT.

—— Sewage farm — Nuisance — Discharge of sewage on private land—Smell—Agricultural ditch—Damages – – 434
See SEWERS.

INSOLVENT ESTATE — Administration — Receiver—Executor surety for testator—Right of indemnity — Right of retainer – – – – – 595
See ADMINISTRATION. 1.

INSURANCE—*Insurance of Mortgage owned by a Company — Condition that Policy should cease if the Interest of the Insured in the Mortgaged Property should pass from the Insured otherwise than by Operation of Law—Insured Company in Liquidation—Power of Liquidator to assign.*

The exception in a prohibition of assignment or alienation of "by operation of law" extends to enable a person, such as a liquidator, to whom the property passes by operation of law with an obligation to realize it, to assign the property.

Doe v. *Bevan* (1815) 3 M. & S. 353, followed.

In re BIRKBECK PERMANENT BENEFIT BUILDING SOCIETY. OFFICIAL RECEIVER *v.* LICENSES INSURANCE CORPORATION
Neville J. 34

INSURANCE COMPANY—*Company limited by Guarantee and not having a Capital divided into Shares—Winding-up—Articles of Association—Construction—"Members"—Directors "ex officio members"—Whether liable as Contributories—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 9, *sub-s.* 4 ; *ss.* 14, 71 ; *Sched. II., Form B—Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *ss.* 10, 118 ; *Sched. III., Form B—Companies (Winding-up) Rules*, 1909, *r.* 80.

The memorandum of an insurance company limited by guarantee and not having a capital divided into shares followed sub-s. 4 of s. 9 of the Companies Act, 1862, and limited the liability of its members to 5*l.* per policy. Its articles provided that the company should consist of the several persons who for the time being should have insured or should have agreed to insure in the company ; that every person who insured with the company should as from the date of such insurance be deemed to have been a member of the company, and every such person should be deemed to have ceased to be a member so soon as he should be no longer insured in the company ; that each member for the time being of the directors should "ex officio be a member of the company" ; that the first directors should be the subscribers of the memorandum, but that directors should not "necessarily be members other than ex officio members." Then followed usual provisions for the election of directors at annual general meetings of the company, one third of the directorate for the time being retiring

INSURANCE COMPANY—*continued.*

in rotation every year, but being eligible for re-election.

Four of the original directors were signatories to the memorandum, and from time to time at annual general meetings of the company retired in rotation from the directorate and were re-elected, and were directors when the company went into liquidation. Their names never were on the register of members and they never insured with the company, but they represented limited companies whose names were on the register and who insured with the company. The liquidator placed on the list of contributories the four directors in their character of directors, and also the companies they represented, as members liable to contribute to the assets of the company :—

Held, that the four directors were not liable as such to contribute as members to the assets of the company and were therefore entitled to have their names removed from the list.

When a person, whose name has been placed on the list of contributories in a particular character, successfully applies to have his name removed from the list in that character, it is not open to the liquidator on the same application to contend that he is entitled to retain the name of the applicant on the list in another character. *In re* PREMIER UNDERWRITING ASSOCIATION, LIMITED (No. 2). CORY'S CASE **Neville J. 81**

2. ——*Company limited by Guarantee and not having its Capital divided into Shares—Winding-up—Past and Present Members—List of Contributories—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 9, *sub-s.* 4; *s.* 38—*Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *s.* 123.

Sect. 38 of the Companies Act, 1862, which is reproduced in s. 123 of the Companies (Consolidation) Act, 1908, applies to all companies formed under the Act. Therefore the past members of a company limited by guarantee, as well as the past members of a company limited by shares, who have ceased to be members within a year before the commencement of the winding up of the company, are not liable to contribute to the assets of the company unless it appears to the Court that the existing members are unable to satisfy the contributions required to be made by them in pursuance of the Act. *In re* PREMIER UNDERWRITING ASSOCIATION, LIMITED (No. 1) - - - **Neville J. 29**

3. —— *Winding-up—Current Policies—Employers' Liability Policies—Contingent Liabilities—Contingent Claims maturing after Winding-up Order—Proofs—"Valuing a policy"—Breach of Contract—Measure of Damages—Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *ss.* 206, 207, 208—*Assurance Companies Act*, 1909 (9 *Edw.* 7, *c.* 49), *ss.* 1, 17; *Sched. VI.*

A policy-holder who is insured against risks under the Employers' Liability Act, 1880, and the Workmen's Compensation Acts, 1897 to 1906, may prove in the liquidation of the insurance company (1.) for ascertained amounts due at the date of the winding-up order from the company to the assured under the policy; (2.) for liabilities in the shape of weekly payments which had

INSURANCE COMPANY—*continued.*

emerged before the date of the winding-up order, such weekly payments to be valued according to the rule prescribed by Sched. VI. (D) to the Assurance Companies Act, 1909; and (3.) for the value of the policy as a contract of indemnity in respect of the risk of fresh liabilities emerging after the date of the winding-up and during the unexpired period of the policy, such valuation to take place as at the date of the winding-up order, not on the basis of an estimate of the contingencies, but upon the basis of a partial return of premium. He is not entitled to prove in addition in respect of liabilities which may have emerged under the policy between the date of the winding-up order and the date of proving.

So *held* by Cozens-Hardy M.R. and Kennedy L.J. (Buckley L.J. dissenting).

Decision of Neville J. reversed.

Held by Neville J. (whose decision on this point was not appealed from), that the policy-holder in such a case is not entitled to prove by way of damages for the difference between the estimated cost of reinsuring the same risks for the same period in another office and the amount of premiums he would have paid under his policy.

The principle of *Macfarlane's Claim* (1880) 17 Ch. D. 337, not adopted.

The opinion of the Lord Ordinary (Lord Cullen) in the Court of Session in Scotland in *In re Life and Health Assurance Association, Ld., Berry's Claim*, approved. *In re* LAW CAR AND GENERAL INSURANCE CORPORATION. J. J. KING & SONS' (LIMITED) CASE. OLD SILKSTONE COLLIERIES' (LIMITED) CASE **C. A. 103**

See also a report of *In re Life and Health Assurance Association, Limited, Berry's Claim*, as a note at pp. 137—139 of the above case.

—— Insurance of mortgage owned by a company—Condition—Policy—Insured company in liquidation—Power of liquidator to assign - - - - - - **34**
See INSURANCE.

INSURANCE (LIFE) — Tenant for life and remainderman—Will—Trust for conversion—Power to postpone — Policies on life of cestui que vie — Premiums, whether payable out of capital - **508**
See CONVERSION.

INSURANCE OF DEBENTURES—*Re-insurance—Contract of Indemnity—Liquidation—Scheme of Arrangement — Limit of Liability of Re-insurer.*

A contract by a company with the holders of debentures issued by another company to guarantee the payment of principal and interest, though it may be called a policy of insurance, is merely a contract of suretyship; and a contract to re-insure such a policy is merely a contract of indemnity. If therefore a company, which has in this way insured the payment of debentures and re-insured a proportion of the risk, goes into liquidation and adopts a scheme under which the debenture-holders will receive less

INSURANCE OF DEBENTURES—*continued.*

than twenty shillings in the pound, the reinsurers are only liable to pay to the original insuring company the amount which it pays in the liquidation to the debenture-holders. *In re* LAW GUARANTEE TRUST AND ACCIDENT SOCIETY, LIMITED. LIVERPOOL MORTGAGE INSURANCE COMPANY'S CASE - **Neville J. 604**

INTEREST—Will—Construction—Legacy payable at twenty-one—Power to trustees to apply legacy in or towards maintenance of legatee—Additional funds provided for maintenance – – **345**
See WILL. 8.

INTESTACY—Gift of residue to forty-six named persons—Codicil—Revocation of gift to two of the number—Confirmation of will—No intestacy – – – **1**
See WILL. 4.

—— Probate—Revocation—Supposed intestacy—Grant of letters of administration—Sale of real estate by administratrix—Subsequent discovery of will appointing executors — Invalidity of purchaser's title – – – – – – **384**
See PROBATE.

INVESTMENTS — Unauthorized — Difficulty of realization—Proposed appropriation in specie—Jurisdiction of Court – **661**
See SETTLEMENT. 5.

IRISH LAW—Irish Universities Act, 1908—Charity—Will—Construction—Legatee, whether sufficiently described – **331**
See CHARITY. 1.

IRISH UNIVERSITIES ACT, 1908 – – **331**
See CHARITY. 1.

JEOPARDY — Company — Debenture-holders — Reserve fund — Proposed distribution amongst shareholders — No default under debentures—Receiver – **588**
See COMPANY. 2.

JOINT STOCK COMPANY.
See under COMPANY.

JURISDICTION—Company—Winding-up.
See under COMPANY.

—— Lunacy.
See under LUNACY.

—— Mortgage — Foreclosure proceedings — Licence by mortgagees to work peat—Jurisdiction of Court to sanction – **96**
See MORTGAGE. 4.

LAND TRANSFER — Probate — Revocation — Supposed intestacy—Grant of letters of administration—Sale of real estate by administratrix—Subsequent discovery of will appointing executors—Invalidity of purchaser's title – – – **384**
See PROBATE.

LANDLORD AND TENANT—*Demise of First Floor Office—Right to fix Flower Boxes outside Office Windows — Trespass — Demise of both Sides of Outer Wall.*

The demise of a floor or a room or an office bounded in part by an outside wall prima facie includes both sides of that wall, unless there be an exception or a reservation or something in the context to exclude it.

The plaintiffs demised an office situate on the first floor of the plaintiffs' leasehold premises to the defendants, who covenanted (inter alia) to keep the inside parts of the office in good and substantial repair. The plaintiffs covenanted to keep in repair the external parts of the demised premises and to permit the defendants to affix their trade signs, to be approved by the plaintiffs, on the outside of that portion of the building in their occupation, and, subject to this latter covenant, the defendants covenanted not without first obtaining the written consent of the plaintiffs to attach or affix any sign, nameplate, or letters to the premises, and to remove all outside names and trade signs at the determination of the tenancy and to make good all damage caused to the outside walls of the building thereby. By the lease under which the plaintiffs themselves held they were bound to repair and maintain the walls of the building.

The defendants, without obtaining the consent of the plaintiffs, affixed flower boxes outside the three windows of their office. In an action by the plaintiffs to restrain this alleged trespass :—

Held, that there was nothing in the defendants' lease to exclude the operation of the general rule; that the demise included the outside of the outer wall of the office; and that the plaintiffs were not entitled to an injunction.

Carlisle Café Co. v. *Muse Brothers & Co.* (1897) 67 L. J. Ch. 53; 77 L. T. 515, followed. HOPE BROTHERS, LIMITED *v.* COWAN
Joyce J. 312

LANDS CLAUSES ACTS—*Costs—Settled Land—Purchase by Railway Company under Compulsory Powers—Payment into Court of Purchase-money—Petition for Payment out by Trustees for Purposes of Settled Land Acts—Separate Appearance of Tenant for Life—Costs—Practice—Lands Clauses Consolidation Act*, 1845 (8 *&* 9 *Vict. c.* 18), *s.* 80.

On a petition by the three trustees of a will who were also trustees for the purposes of the Settled Land Acts, and one of them a tenant for life of one moiety as well of the settled estate, for payment out of money paid into Court in respect of the purchase-money of land forming part of the settled estate taken by a railway company under its compulsory powers, the tenant for life of the other moiety and the two remaindermen who appeared by one counsel were held to be properly made respondents and their costs were ordered to be paid by the railway company under s. 80 of the Lands Clauses Consolidation Act, 1845. *In re* PIGGIN. *Ex parte* MANSFIELD RAILWAY COMPANY
Warrington J. 326

LATENT AMBIGUITY.
See AMBIGUITY.

LEASE.
See under LANDLORD AND TENANT.

—— Mining lease.
See under MINE.

—— Settled estates—Power of leasing—Tenant for life — Statutory powers — Mining lease—Rents and profits — "Contrary intention" – – – – **210**
See SETTLED LAND. 1.

—— Will — Lease by testator — Covenant by lessor—Specific devise of reversion—Liability for performance after lessor's death – – – – – **491**
See ADMINISTRATION. 2.

LEGACY—Will.
See under WILL.

LEGACY DUTY.
See under REVENUE.

LICENCE—Mortgage—Foreclosure proceedings —Licence by mortgagees to work peat —Jurisdiction of Court to sanction **96**
See MORTGAGE. 4.

LIGHT—Electric light.
See under ELECTRIC LIGHT.

LIGHT AND AIR—*Ancient Light—Obstruction —Height of Buildings on Servient Tenement raised in one Part and lowered in other Part—No Diminution in Total Amount of Light—No Damage—Negative Easement over whole Servient Tenement.*

The plaintiff sought to recover damages for the alleged obstruction to his ancient light caused by the erection on part of the defendants' servient tenement of a building having a tower 35 ft. high and 10 feet square in the place of a portion of the previous building, which was only 12 ft. 6 in. high, notwithstanding the fact that by the lowering of the remaining buildings on the defendants' servient tenement the total amount of light coming to the dominant tenement over the servient tenement was in no way diminished :—

Held, that the defendants were entitled to credit for the new or increased light coming over their lowered buildings and were not, in the circumstances, liable to pay any compensation, but that having once taken credit for the new or increased light they could not subsequently deprive the dominant tenement of it by restoring the lowered buildings to their former height.

Held, further, that the right to ancient light enjoyed by the dominant tenement was a negative easement over the servient tenement considered as a whole, and, since the decision in *Colls* v. *Home and Colonial Stores* [1904] A. C. 179, the plaintiff had no property or right in or to any particular cones or pencils of rays of light coming in any particular direction over any particular portion of the servient tenement, and that therefore the variation in the heights of the buildings on the servient tenement, although altering the sky line over which the ancient light used to come, conferred no right of action on the plaintiff provided the interference thereby occasioned did not amount to an actionable nuisance within the decision in *Colls* v. *Home and Colonial Stores*.

Observations of Lord Lindley in *Colls* v. *Home and Colonial Stores* [1904] A. C. 179, 210, 211, and of Lord Atkinson in *Jolly* v. *Kine* [1907] A. C. 1, 7, 8, considered. DAVIS *v.* MARRABLE – – – – **Joyce J. 421**

LIMITATION — Marriage settlement — Land—Limitation to settlor for life with ultimate limitation to his "heir-at-law"—Construction – – – **498**
See SETTLEMENT. 3.

—— Settlement—Omission of words of limitation — Equitable estate in freehold and copyhold property—Estate for life of trustee – – – – – **636**
See SETTLEMENT. 4.

LIMITATIONS, STATUTE OF — *Mortgage — Real Estate — Trust for Sale — Proceeds of Sale—"Land"—Real Property Limitation Act*, 1833 (3 *&* 4 *Will.* 4, *c.* 27), *ss.* 1, 34—*Real Property Limitation Act*, 1874 (37 *&* 38 *Vict. c.* 57), *s.* 8.

A mortgagor's interest in the proceeds of sale of land held on trust for sale is an interest in "land" as defined by the Real Property Limitation Act, 1833, s. 1, and therefore, under s. 34 of the same Act and s. 8 of the Real Property Limitation Act, 1874, after the lapse of twelve years, in the absence of any payment or acknowledgment, the title of the mortgagee is extinguished.

In re Hazledine's Trusts [1908] 1 Ch 34, and *Kirkland* v. *Peatfield* [1903] 1 K. B. 756, followed. *In re* FOX. BROOKS *v.* MARSTON
Warrington J. 75

2. —— *Will—Residuary Devise and Bequest —Trust to pay Debts out of Mixed Fund — Debt, whether barred against Personal but not against Real Estate—Limitation Act*, 1623 (21 *Jac.* 1, *c.* 16)—*Real Property Limitation Act*, 1874 (37 *&* 38 *Vict. c.* 57).

Testator, by his will, devised and bequeathed his residuary real and personal estate to trustees upon trust for sale and conversion, and out of the moneys produced from such sale and conversion to pay his funeral and testamentary expenses and debts, and to hold the residue upon certain trusts. He died in November, 1907. Shortly after his death the defendant company made a claim for 902*l.* against his estate in respect of a debt which, as the Court held, arose in and subsequently to 1903, but took no steps to enforce it. On a summons by the trustees to determine the question whether the defendant company were creditors of the testator to any and (if so) what amount :—

Held, that the testator by creating a mixed fund and imposing a duty not on the executors but on the trustees of paying his debts out of that mixed fund had created a charge not of a

LIMITATIONS, STATUTE OF—*continued.*
part but of the whole of the debts on the real estate, and that it could not be said that any part of the debts was attributable to the personal estate.

Held, therefore, that no part of the defendant company's debt was barred by the Statute of Limitations.

Query raised by Kay J. in *In re Stephens* (1889) 43 Ch. D. 39, 45, answered in the negative. *In re* RAGGI. BRASS *v.* H. YOUNG & CO., LIMITED - - **Warrington J. 206**

LOCAL GOVERNMENT—*Alleged Right of Way —Action by Landowner for Trespass—Resolution of District Council to defend Action—District Council added as Defendants — Pleadings — "Neither claim nor deny"—Motion to strike out Defence of District Council as embarrassing— Rules of the Supreme Court, Order XIX., r. 27— Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *s.* 26, *sub-ss.* 1, 3.

The plaintiff claimed a declaration of title and an injunction to restrain certain persons from trespassing on his lands, and they pleaded a public right of footway over his lands. The district council then passed a resolution under s. 3 of the Local Government Act, 1894, to defend the action. Thereupon the plaintiff added them as co-defendants and by his amended statement of claim alleged that they threatened and intended to exercise the alleged right of way. The district council, with the view of avoiding liability for the costs of the action, by their defence denied that they threatened or intended to exercise the right of way and pleaded that they neither asserted nor denied the existence of the right of way :—

Held by Neville J. and by the Court of Appeal, that this defence did not infringe any rule of pleading and was not embarrassing, and that the liability (if any) of the district council for costs would be determined at the trial of the action. THORNHILL *v.* WEEKS (No. 2) - **C. A. 464**

—— Sewage farm.
See under SEWERS.

—— Sewers.
See under SEWERS.

—— Streets.
See under STREETS.

—— Vendor and purchaser—Omission to prevent acquisition of title under Statute of Limitations—Liability of vendor—Measure of damages - - - **39**
See VENDOR AND PURCHASER.

LONDON—Electric lighting—Injunction—Connecting two areas of supply — Connection already existing - - **248**
See ELECTRIC LIGHT.

LONDON ELECTRIC SUPPLY ACT, 1908, s. 4, sub-s. 2 - - - - - **248**
See ELECTRIC LIGHT.

LUNACY—*Jurisdiction—Allowances to Relatives of Lunatic—Orders directing Payment of Surplus Income of Estate of Lunatic to her Daughters — Death of Lunatic — Moneys in Hands of Committee representing unapplied Surplus Income—Claim by Daughters—Rules in Lunacy*, 1892, *r.* 81.

Under orders in lunacy the net surplus income of a lunatic's estate, after providing for the maintenance of the lunatic and other allowances, was ordered to be paid to her daughters in certain shares. At the death of the lunatic the committee of her estate had in his hands certain moneys representing net surplus income received by him since the last payments made by him to the daughters, which he subsequently paid over to the administrator with the will annexed of the lunatic. These moneys were claimed by the daughters as due to them under the orders in lunacy :—

Held, that the death of the lunatic determined the jurisdiction in lunacy and that the moneys in the hands of the administrator were not therefore payable to the daughters under the orders in lunacy, but formed part of the corpus of the lunatic's estate and were applicable according to the provisions of her will.

In re Way (1861) 30 L. J. (Ch.) 815 ; 3 D. F. & J. 175, and *In re Marman's Trusts* (1878) 26 W. R. 621, followed. *In re* BENNETT. GREENWOOD *v.* BENNETT - **Warrington J. 318**

—— Discovery — Person of unsound mind — Next friend — Affidavit of documents - - - - - **286**
See PRACTICE. 1.

LUNACY RULES, 1892, r. 81 - - - **318**
See LUNACY.

MAINTENANCE— Will — Construction — Interest—Legacy payable at twenty-one— Power to trustees to apply legacy in or towards maintenance of legatee— Additional funds provided for maintenance - - - - - **345**
See WILL. 8.

MANAGER—Receiver and manager—Company
See COMPANY. 3. **303**

MANDATORY INJUNCTION — Building in street - - - - - **444**
See STREETS.

MANOR — *Rights of Common — Turbary — Estovers — Nuisance — Abatement — Excessive Trespass—Cutting down Trees — Injunction— Damages.*

The commoners of a manor may abate a nuisance, which wholly excludes them from exercising their rights of common over the lord's waste, without first resorting to the Courts for relief. But if the nuisance only amounts to a partial exclusion, a sufficiency of common being left for the exercise of common rights, the commoners ought not to take the law into their own hands : their proper remedy is to apply to the Courts for a declaration of their rights. This rule applies whether the right of common alleged

MANOR—*continued.*

to be infringed is for common of pasture, or of turbary, or of estovers.

Where therefore tenants of a manor in assertion of a claim to common of turbary and of estovers over certain heath lands, alleged to be waste of the manor, entered on the heath lands and cut down trees, there being sufficient heath lands for the exercise of the rights claimed, if any :—

Held, that the trespass was unjustifiable and that the lord was entitled to an injunction and damages.

The principle of *Sadgrove* v. *Kirby* (1795) 6 T. R. 483, applied. HOPE *v.* OSBORNE **Neville J. 349**

—— Common, Rights of—Trespass by commoner —Serious injury to waste—Suit by fellow commoner—Injunction – **416**
See COMMON.

MAPS — Evidence — Market — Presumption of lost grant — Easement — Copies from Record Office – – – – **140**
See MARKET.

MARKET—*Extension of Market—Charter Days —By Days—In sive juxta—Overflow—Streets subject to Market Rights—Presumption of Lost Grant—Easement—Dedication subject to Obstruction— Private Market—Tolls—Reasonable —Payment by Sellers—Publication of Charges —Evidence—Maps—Copies from Record Office.*

In 1682 Charles II. granted to H.'s predecessor in title a right to hold markets on Thursdays and Saturdays. In *Attorney-General* v. *Horner* (1884) 14 Q. B. D. 245 ; (1885) 11 App. Cas. 66, it was held that this charter authorized an overflow of the market into the adjoining streets on Thursdays and Saturdays, and that a lost charter for the other days of the week was not to be presumed. H. held markets on all the days of the week, made use of the adjoining streets for the purposes of these markets, and took tolls from the persons who used them ; and took tolls from sellers instead of from buyers. An action was brought to restrain him from doing so :—

Held, that the question of a lost grant of a market on days other than Thursdays and Saturdays could not, after the decision in *Attorney-General* v. *Horner*, 14 Q. B. D. 245, be raised in that Court ; that the defendant had no right in respect of a private market to overflow into the streets on days other than Thursdays and Saturdays ; that he had always claimed to act under the franchise, and the Court would not presume a legal origin for a usage which was inconsistent with the right claimed and would not presume that the streets had been dedicated to the public subject to the right of overflow ; that in the absence of custom or prescription or individual contracts to the contrary market tolls were payable by the buyers and not by the sellers ; that the tolls taken were reasonable and there was no obligation on a franchise owner to publish a list of his charges ; and that the fact that other members of the public would be benefited by the continuance of the illegal acts was immaterial.

MARKET—*continued.*

Maps from the British Museum and Guildhall Library not admitted as evidence of particular facts without further proof.

Copy from the Record Office of a petition, stated to have been filed there but not produced, admitted.

Decision of Warrington J. varied. ATTORNEY-GENERAL *v.* HORNER (No. 2) – – **C. A. 140**

MARRIAGE SETTLEMENT.
See under SETTLEMENT.

MASTER AND SERVANT — *Trade Secret — Secret Process — Confidential Employment — Implied Obligation of Servant—Information as to Secret Process acquired during Employment —Information merely committed to Memory— Improper Use of Information—Action to restrain —Secret Process not disclosed to Court—Power of Court to grant Injunction.*

An ex-servant who has been confidentially employed in the manufacture of an article under a secret process is under an implied obligation to his late master not to use or disclose any knowledge or information as to that secret process acquired by him during his employment.

Morison v. *Moat* (1851) 9 Hare, 241; *Tuck & Sons* v. *Priester* (1887) 19 Q. B. D. 629 ; and *Robb* v. *Green* [1895] 2 Q. B. 1, 315, applied.

This principle applies to information acquired and retained in the servant's memory as well as to information committed to writing and existing in a tangible form.

The observations contra in *Merryweather* v. *Moore* [1892] 2 Ch. 518, 524 ; *Lamb* v. *Evans* [1893] 1 Ch. 218, 236 ; *Louis* v. *Smellie* [1895] W. N. 115 ; 73 L. T. 226, 228 ; and *Measures Brothers, Ld.* v. *Measures* [1910] 1 Ch. 336, 346, were not addressed to the case of a secret process.

Where the Court is satisfied that there is a secret process, and that the ex-servant has learnt a material part of it during his employment, and has made an improper use of the knowledge so obtained, it can grant an injunction, although the actual details of the secret process are not disclosed to the Court at the trial.

Newbery v. *James* (1817) 2 Mer. 446, 451, distinguished. AMBER SIZE AND CHEMICAL COMPANY, LIMITED *v.* MENZEL **Astbury J. 239**

"**MEMBERS**" — Company — Winding-up — Directors "ex officio members" — Contributories – – – – **81**
See INSURANCE COMPANY. 1.

MERGER—*Settled Estate — Tenancy for Life and Freehold Reversion—Executory Gift over— Conveyance of Life Estate—Intention — Merger at Law and in Equity.*

Under the will of a testator, C. A., who died in February, 1889, a freehold farm stood limited to the use of the testator's widow for life with remainder to the use of her son C. B. A. in fee, with an executory gift over to G. A. in the event of the death, unmarried, of C. B. A. in the lifetime of the widow. By a deed of December 9, 1889, the widow, in consideration of 10*s.* and of natural love and affection, conveyed the farm

MERGER—*continued.*

unto and to the use of C. B. A. for all the remainder of her life. G. A. died in 1900, having by his will devised the farm to trustees upon trust for sale and division amongst his children. In 1902 the farm was sold and the money invested. C. B. A. died intestate and unmarried on July 22, 1912, and letters of administration to his estate were granted to his mother. She was still alive. Upon an originating summons by the surviving trustee of the will of C. A., for the purposes of the Settled Land Acts, to determine who was entitled to the capital moneys representing the proceeds of sale of the farm:—

Held, that there was a merger of the life interest of the widow in the freehold reversion by operation of law and also in equity, inasmuch as no presumption could be made of an intention on the part of the grantee to preserve the life estate; and therefore the capital moneys in question belonged to the trustees of the will of G. A. *In re* ATTKINS. LIFE *v.* ATTKINS **Eve J. 619**

MINE—Mining lease—Settled estate—Will—Construction — Tenant in fee with executory gift over—Unimpeachable for waste—Rents and royalties – **357**
See SETTLED LAND. 2.

—— Mining partnership of two—"Company"—Winding-up — Jurisdiction — High Court—County court – – – **530**
See STANNARIES.

—— Settled estates—Power of leasing—Tenant for life—Statutory powers — Mining lease—Rents and profits — "Contrary intention" – – – – **210**
See SETTLED LAND. 1.

MISDESCRIPTION—Will—Latent ambiguity—Falsa demonstratio – – – **488**
See WILL. 9.

MORTGAGE — *Debenture — Priority—Construction—Floating Charge—Company restrained from creating Further Charge in Priority to First Debentures—After-acquired Property—Specific Mortgage subject to Provisions of First Security.*

By a debenture stock trust deed a company gave a specific and a floating charge reserving power to deal with its assets but not to create any further charge over its property generally to rank pari passu with or in priority to or otherwise than subject or in subordination to the security thereby created. After the date of this deed the company purchased freeholds. By a subsequent debenture stock trust deed the company granted to trustees and their heirs certain freeholds, including the after-acquired property, by way of mortgage, upon the trusts thereinafter mentioned, subject to the provisions of the first deed. The second deed also contained a general charge on all the company's assets subject to the first issue. The security constituted by the first deed was now crystallized:—

Held, affirming the decision of Parker J., that the security of the debenture stock holders under the second deed was postponed to that of

MORTGAGE—*continued.*

the stockholders secured by the first deed. *In re* ROBERT STEPHENSON & CO., LIMITED. POOLE *v.* THE COMPANY – – – **C. A. 201**

2. —— *Equitable Charge by Deposit—Subsequent Legal Mortgage to another Incumbrancer subject to Prior Charge—No Notice to First Mortgagee—First Mortgage subsequently paid off—Title Deeds handed to Mortgagor—Title Deeds then pledged to secure Mortgagor's Banking Account—Priority.*

The owner of leasehold premises charged them with the payment of certain moneys to the G. and M. Bank and deposited the lease as security. He then mortgaged the premises by sub-demise expressly subject to the bank's charge. The legal mortgagee did not give the bank notice of his mortgage. The mortgagor subsequently, without the knowledge of the legal mortgagee, paid off the G. and M. Bank, obtained the lease from them, and deposited it with the defendant bank, who had no knowledge of the legal mortgage, to secure moneys advanced by them. In an action by the executors of the legal mortgagee to establish their priority over the defendant bank:—

Held, that the legal mortgagee had not been guilty of any misconduct, negligence, or want of caution for which he could be held directly or indirectly responsible; and that nothing had happened to take away or affect his original priority. GRIERSON *v.* NATIONAL PROVINCIAL BANK OF ENGLAND, LIMITED – **Joyce J. 18**

3. —— *Foreclosure—Parties—Mortgagor and Mortgagee — First Mortgage of One Share — Second Mortgage of Three Shares by Three Comortgagors—Right of Indemnity between themselves — Foreclosure of First Mortgage — Comortgagors under Second Mortgage not made Parties—Effect of Foreclosure.*

A co-mortgagor, liable as between himself and the other co-mortgagors to contribute a proportion only of the total debt and entitled to indemnity for any excess out of the shares of his co-mortgagors, is a necessary party to proceedings by a prior mortgagee to foreclose the share of one of his co-mortgagors.

Stokes v. *Clendon* (1790) 3 Swans. 150, n., followed.

On an event which happened in 1912 John, or the persons claiming under him, became entitled to 20,000*l.* part of, and John, William, and Walter, or the persons claiming under them respectively, became entitled in equal third shares to the residue of a fund in Court representing the residuary estate of a testator who died in 1860. In 1881 William mortgaged his share to a first mortgagee. In 1882 John, William, and Walter joined in a mortgage to the trustees of an insurance society whereby, in consideration of moneys advanced in part to John and in part by John's direction to William and Walter, John covenanted within six months after the happening of the said event to pay to the society the sum of 17,876*l.* with interest computed from the happening of the said event, and John assigned his 20,000*l.* and each of the three mortgagors assigned his one third share to the trustees of

MORTGAGE—*continued.*

the society, subject as to William's share to the prior mortgage of 1881, and subject as to all the premises to redemption on payment by the three mortgagors, or any of them, within six months after the happening of the said event, of the said sum of 17,876*l.* with interest; and it was thereby agreed that, as between the three mortgagors and the respective premises mortgaged by them respectively, John and the premises mortgaged by him should be primarily liable for 13,407*l.*, William and the premises mortgaged by him for 3129*l.*, and Walter and the premises mortgaged by him for 1340*l.*, and that each of them would accordingly contribute in those proportions to the payment of the total sum of 17,876*l.* and would indemnify the others against the payment of the proportion for which he was to be primarily liable, but this provision was not to affect the mortgagees or preclude them from enforcing their security in such order as they thought fit. In 1882 the first mortgagees brought a foreclosure action against William and the trustees of the society and obtained a foreclosure order absolute. John and Walter were not parties to these proceedings:—

Held, that John and Walter were necessary parties to the foreclosure proceedings and were therefore unaffected by the foreclosure; and that as against John and Walter, or persons claiming under them, William's share must be applied, first, in payment of the amount due under the first mortgage, and secondly in making good its due contribution to the mortgage to the trustees of the society.

Held, also, that as against William, or persons claiming under him, the foreclosure remained absolute, and that the balance of his share after making the payments aforesaid belonged therefore to the first mortgagee or persons claiming under him. GEE *v.* LIDDELL - **Warrington J. 62**

4. —— *Foreclosure Proceedings—Licence by Mortgagees to work Peat—Jurisdiction of Court to sanction—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 25, *sub-s.* 2.

Mortgagees of land, which was in the possession of a receiver appointed by the Court in foreclosure proceedings, applied to the Court before any foreclosure order had been made to sanction an exclusive licence for a term of years, and at a premium and royalties, to work deposits of peat on the mortgaged land:—

Held, that the Court had no power to sanction the licence.

Quære, whether s. 48 of the Chancery Amendment Act, 1852, s. 25 of the Conveyancing Act, 1881, s. 13 of the Law of Property Amendment Act, 1859, s. 2 of the Confirmation of Sales Act, 1862, and s. 44 of the Trustee Act, 1893 (as amended by s. 3 of the Trustee Act, 1893, Amendment Act, 1894), raise the necessary implication that the sales of minerals apart from the land and other sales therein referred to could not, apart from those provisions, have been ordered by the Court in proceedings for foreclosure or sale. STAMFORD, SPALDING AND BOSTON BANKING COMPANY *v.* KEEBLE **Sargant J. 96**

MORTGAGE—*continued.*

—— Insurance of mortgage owned by a company — Condition — Policy — Insured company in liquidation — Power of liquidator to assign - - - **34**
See INSURANCE.

—— Limitations, Statute of—Mortgage—Real estate—Trust for sale—Proceeds of sale
See LIMITATIONS, STATUTE OF. 1. **75**

—— Trustee — Appropriation of security by defaulting trustee to meet breach of trust—Declaration of trust—Equitable mortgage - - - - - **478**
See TRUSTEE.

NAME—Trade mark — Registration—Application to register surname—Passing off—Action to restrain—Use by defendant of his own name - - - **545**
See TRADE MARK. 2.

NEXT FRIEND—Discovery—Person of unsound mind—Affidavit of documents - **286**
See PRACTICE. 1.

NOTICE—Building in street - - - **444**
See STREETS.

—— Mortgages — Priority — Title deeds — No notice to first mortgagee - - **18**
See MORTGAGE. 2.

NUISANCE—Common, Rights of — Turbary — Estovers—Abatement—Excessive trespass—Cutting down trees—Injunction—Damages - - - - **349**
See MANOR.

—— Sewage farm — Discharge of sewage on private land — Smell — Agricultural ditch—Injunction—Damages - **434**
See SEWERS.

OBSTRUCTION—Light and air.
See under LIGHT AND AIR.

PARCELS—Conveyance—Plan — Falsa demonstratio - - - - - **39**
See VENDOR AND PURCHASER.

PARTIES—Mortgages—Foreclosure, Effect of.
See MORTGAGE. 3. **62**

PARTNERSHIP—Mining partnership of two—"Company"—Winding-up — Jurisdiction—High Court—County court - **530**
See STANNARIES.

PASSING OFF—Trade mark — Registration — Application to register surname—Action to restrain—Use by defendant of his own name - - - - **545**
See TRADE MARK. 2.

PAYMENT OUT OF COURT—Lands Clauses Acts—Costs—Petition for payment out by trustees for purposes of Settled Land Acts—Separate appearance of tenant for life - - - - - **326**
See LANDS CLAUSES ACTS.

PEAT — Foreclosure proceedings — Licence by mortgagee to work peat—Jurisdiction of Court to sanction – – – 96
See MORTGAGE. 4.

PLAN — Conveyance—Parcels — Falsa demonstratio – – – – – 39
See VENDOR AND PURCHASER.

PLEADINGS—Practice.
See PRACTICE.

POLICY—Insurance company.
See under INSURANCE COMPANY.

—— Insurance (Life).
See INSURANCE (LIFE).

POSTPONEMENT—Conversion.
See under CONVERSION.

POWER OF APPOINTMENT—Excessive exercise—Contingent class—Objects—Non-objects — Ascertainment at future period – – – – – 666
See WILL. 1.

PRACTICE —*Discovery — Person of Unsound Mind—Next Friend—Affidavit of Documents—Rules of the Supreme Court, Order* XXXI., *rr.* 12, 29.

The next friend of a person of unsound mind cannot be ordered to file an affidavit of documents under Order XXXI., r. 12.

Dyke v. *Stephens* (1885) 30 Ch. D. 189, applied.

Higginson v. *Hall* (1879) 10 Ch. D. 235, not followed.

In an action by a person of unsound mind by a next friend an order was made under Order XXXI., r. 12, that the person of unsound mind by his next friend "and such next friend" should file an affidavit of documents, and the next friend filed an affidavit accordingly, and the defendants then applied for a further and better affidavit :—

Held, that, the order having been made without jurisdiction, the Court could refuse the application without first setting aside the order. PINK *v.* J. A. SHARWOOD & CO., LIMITED
Eve J. 286

2. —— *Discovery as between Co-defendants —Rights to be adjusted between the Parties—Rules of the Supreme Court, Order* XXXI., *rr.* 12, 14.

The plaintiff claimed as assignee of the defendant J. to be entitled to an aliquot part of certain commission which he alleged was due from the defendants B. & Co. to the defendant J. B. & Co. by their defence alleged that the plaintiff had no right at all, inasmuch as they had a claim against J. for damages for misrepresentation which they were entitled to set off against any claim by him for commission. They did not, however, put in any counterclaim :—

Held by Cozens-Hardy M.R. and Kennedy L.J. (Swinfen Eady L.J. dissenting), that B. & Co. were not entitled to an order for discovery against J.

Shaw v. *Smith* (1886) 18 Q. B. D. 193, applied.

Decision of Warrington J. affirmed. BIRCHAL *v.* BIRCH, CRISP & CO. – – C. A. 375

—— Costs.
See under COSTS.

—— Pleadings—Alleged right of way—Action by landowner for trespass — District council added as defendants—Pleadings
See LOCAL GOVERNMENT. 464

PREFERENTIAL CLAIM—Company—Receiver and manager—Appointment by debenture-holders — Notice of preferential claim — Subsequent payments to ordinary creditors in carrying on business — Loss of assets—Liability to preferential creditor – – – 303
See COMPANY. 3.

—— Company — Winding-up—Director—"Servants"—Articles of association – 279
See COMPANY. 5.

PREMIUMS—Policies on life of cestui que vie —Premiums, whether payable out of capital—Tenant for life and remainderman – – – – – – 508
See CONVERSION.

PRESUMPTION — Market — Charter days — Streets subject to market rights — Presumption of lost grant—Easement —Dedication subject to obstruction
See MARKET. 140

PRINCIPAL AND SURETY—Insolvent estate — Receiver — Executor surety for testator—Right of indemnity—Right of retainer – – – – – 595
See ADMINISTRATION. 1.

PRIORITY—Company — Voluntary liquidation — Unsuccessful liquidation — Costs — Priorities – – – – – 26
See COMPANY. 4.

—— Mortgage — Debenture — Construction — Floating charge — Company — Specific mortgage subject to provisions of first security – – – – – 201
See MORTGAGE. 1.

—— Mortgages – – – – – 18
See MORTGAGE. 2.

PRIVILEGE — Injunction — Documents — Restraint of publication — Documents improperly obtained — Secondary evidence—Copies – – – – 469
See INJUNCTION.

PROBATE—*Revocation — Supposed Intestacy—Grant of Letters of Administration—Sale of Real Estate by Administratrix — Subsequent Discovery of Will appointing Executors — Invalidity of Purchaser's Title—Court of Probate*

PROBATE—*continued.*

Act, 1857 (20 & 21 *Vict. c.* 77), *ss.* 75, 77, 78—*Land Transfer Act*, 1897 (60 & 61 *Vict. c.* 65), *ss.* 1, 2, 24.

A grant of administration bona fide obtained in ignorance of a will appointing executors is void ab initio, and any sale of real estate by the supposed administratrix is also void, though, if the sale is made for payment of debts or duties which the executors would have been compellable to pay, the purchaser may possibly have a right or lien by subrogation to the amount (if any) of his purchase-money actually so applied.

Graysbrook v. *Fox* (1565) 1 Plowd. 275; *Abram* v. *Cunningham* (1677) 2 Lev. 182; *Boxall* v. *Boxall* (1884) 27 Ch. D. 220; and *Ellis* v. *Ellis* [1905] 1 Ch. 613, applied.

Debendra Nath Dutt v. *Administrator-General of Bengal* (1908) L. R. 35 Ind. Ap. 109, and *Craster* v. *Thomas* [1909] 2 Ch. 348, distinguished.

Dicta in *Doyle* v. *Blake* (1804) 2 Sch. & Lef. 231, 237, and *Errington* v. *Rorke* (1857) 6 Ir. C. L. Rep. 279, 316, disapproved. HEWSON *v.* SHELLEY – – – – **Astbury J. 384**

PROBATE DUTY.
See under REVENUE.

PROOF — Insurance company — Winding-up—Current policies—Employers' liability policies—Contingent liabilities — Contingent claims maturing after winding-up order – – – – – **103**
See INSURANCE COMPANY. 3.

PUBLIC HEALTH — Improvement Commissioners — Special Act — Corporation — Contract not under seal — Executed consideration—Contract to pay implied from acceptance of benefit – **407**
See CORPORATION.

—— Sewers.
See under SEWERS.

—— Streets.
See under STREETS.

PUBLICATION — Injunction — Documents — Privilege—Restraint of publication—Documents improperly obtained — Secondary evidence—Copies – **469**
See INJUNCTION.

PURCHASER—Vendor and.
See under VENDOR AND PURCHASER.

RAILWAY — Lands Clauses Acts — Costs — Petition for payment out by trustees for purposes of Settled Land Acts —Separate appearance of tenant for life – – – – – – **326**
See LANDS CLAUSES ACTS.

REAL PROPERTY LIMITATION ACT, 1874 75, 206
See LIMITATIONS, STATUTE OF. 1, 2.

RECEIVER—Administration — Insolvent estate —Executor surety for testator—Right of indemnity—Right of retainer – **595**
See ADMINISTRATION. 1.

—— Company — Debenture-holders — Reserve fund — Proposed distribution amongst shareholders—No default under debentures—Jeopardy – – – **588**
See COMPANY. 2.

—— Company — Receiver and manager — Appointment by debenture-holders — Notice of preferential claim—Subsequent payments to ordinary creditors in carrying on business—Loss of assets —Liability to preferential creditor **303**
See COMPANY. 3.

RECORD OFFICE—Copies from—Evidence—Maps – – – – – **140**
See MARKET.

REGISTRATION—Company—Charge to secure future advances—Creation of charge—Charge by deposit – – – **366**
See COMPANY. 1.

—— Trade mark.
See under TRADE MARK.

RE-INSURANCE—Debentures – – **604**
See INSURANCE OF DEBENTURES.

RELIGIOUS PURPOSES—Charity—Endowment for a "sermon" once a year—Increase in the income — Cyprès — Trustees — Scheme – – – – – **261**
See CHARITY. 2.

REMAINDERMAN—Tenant for life and.
See under SETTLED ESTATE and under SETTLED LAND.

RENTS AND PROFITS—Settled estates—Power of leasing—Tenant for life—Statutory powers — Mining lease — "Contrary intention" – – – – **210**
See SETTLED LAND. 1.

RENTS AND ROYALTIES — Settled estate — Will—Construction—Tenant in fee with executory gift over — Unimpeachable for waste—Mining lease—Quality of estate – – – – – **357**
See SETTLED LAND. 2.

RESIDUE—Gift of residue to forty-six named persons—Codicil—Revocation of gift to two of the number — Confirmation of will—No intestacy – – – **1**
See WILL. 4.

RETAINER — Right of — Insolvent estate — Receiver—Executor surety for testator —Right of indemnity – – **595**
See ADMINISTRATION. 1.

REVENUE—*Estate Duty—Exemption—Settled Property — Marriage Settlement — Covenant to settle After-acquired Property—Probate Duty—"Personal property settled by a disposition"*—

REVENUE—*continued.*

Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 21, *sub-s.* 1.

The payment of probate duty in respect of personal property bequeathed by a testator dying before the coming into operation of the Finance Act, 1894, to a legatee already bound by a covenant in his marriage settlement to settle such property, does not exempt the property from liability to pay estate duty under the settlement, such a case not falling within the terms of s. 21, sub-s. 1, of the Finance Act, 1894. *In re* VISCOUNTESS TORRINGTON
Eve J. 623

—— Administration — Estate duty — Legacy duty—Adjustment of accounts between tenant for life and remainderman – **704**
See ADMINISTRATION. 3.

REVERSION—Merger—Tenancy for life and freehold reversion—Executory gift over —Conveyance of life estate—Intention
See MERGER. **619**

—— Specific devise of—Lease by testator—Covenant by lessor—Liability for performance after lessor's death – **491**
See ADMINISTRATION. 2.

REVOCATION—Probate.
See under PROBATE.

RIGHT OF WAY.
See WAY, RIGHT OF.

RIGHTS OF COMMON.
See under COMMON.

ROYALTIES—Rents and—Mining lease—Liability of estate – – – – **357**
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SETTLED ESTATE — *Tenant for Life and Remainderman—Preference Shares—Cumulative Preferential Dividend—Arrears—Death of Life Tenant—Future Dividends—Apportionment.*

Where preference shares carrying a fixed cumulative preferential dividend are bequeathed in trust for a life tenant and remaindermen, and no dividend is declared or paid for the financial years including the life tenancy, the life tenant's executors are not entitled to have the arrears made good out of future preferential dividends.

In re Taylor's Trusts [1905] 1 Ch. 734, and *In re Armitage* [1893] 3 Ch. 337, followed and applied.

In re Griffith (1879) 12 Ch. D. 655, and *Bulkeley* v. *Stephens* [1896] 2 Ch. 241, distinguished. *In re* SALE. NISBET *v.* PHILP
Astbury J. 697

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—— Settled land.
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—— Will—Trust for conversion—Power to postpone—Premiums, whether payable out of capital – – – – **508**
See CONVERSION.

SETTLED LAND—*Power of leasing—Tenant for Life—Statutory Powers—Mining Lease—Rents and Profits — " Contrary Intention " — Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 11.

A settlement of real estates empowered any male tenant for life in possession or the trustees of the settlement, if the tenant for life should be a female or an infant, to grant leases of open and unopened mines and directed in effect that the whole of the rents and royalties under such leases were to be applied as income. A female tenant for life in possession granted mining leases in exercise of her powers under the Settled Land Act, 1882 :—

Held, that the rents and royalties under the leases were to be applied as directed by the

SETTLED LAND—*continued.*

settlement and not in accordance with s. 11 of the Act. *In re* RAYER. RAYER *v.* RAYER
Neville J. 210

2. —— *Settled Estate — Will— Construction —Tenant in Fee with Executory Gift over— Unimpeachable for Waste—Mining Lease— Rents and Royalties—"Contrary Intention" expressed in Settlement—Quality of Estate— Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 6, 11 ; *s.* 58, *sub-s.* 1 (*ii.*).

A tenant in fee simple in possession of real estates, with an executory gift over, is not impeachable for waste.

Turner v. *Wright* (1860) 2 D. F. & J. 234, followed.

By his will the testator bequeathed and devised to his wife the whole of his real and personal estate absolutely "in full confidence that she will make such use of it as I should have made myself, and that at her death she will devise it to such one or more of my nieces as she may think fit, and in default of any disposition thereof by her will or testament I hereby direct that all my estate and property acquired by her under this my will shall, at her death, be equally divided among the surviving said nieces."

The House of Lords decided (*Comiskey* v. *Bowring-Hanbury* [1905] A. C. 84) that there was an absolute gift of the testator's real and personal estate to his wife, subject to an executory gift over at her death.

Upon an application by the widow (who had married again) to ascertain whether she was entitled to the whole of the mining rents and royalties in respect of mining leases granted under the powers of the Settled Land Acts :—

Held, that there was in the will a sufficient expression of a "contrary intention" to exclude the operation of s. 11 of the Settled Land Act, 1882, and there was no obligation upon the applicant to set aside as capital any part of the rents, royalties, and profits, under mining leases, pursuant to that section.

The quality of the applicant's estate could not, of itself, be treated as amounting to the expression of a "contrary intention" in the settlement. *In re* HANBURY'S SETTLED ESTATES - - - - - **Eve J. 357**

—— Costs—Purchase by railway company under compulsory powers — Payment into Court—Petition for payment out by trustees for purposes of Settled Land Acts—Separate appearance of tenant for life - - - - - **326**
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—— Estate duty.
See under REVENUE.

—— Merger — Tenancy for life and freehold reversion—Executory gift over—Conveyance of life estate — Intention — Merger at law and in equity - **619**
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—— Settled estate.
See under SETTLED ESTATE.

SETTLED LAND—*continued.*

—— Settlement.
See under SETTLEMENT.

SETTLEMENT—*Construction—Hotchpot Clause —Settled Funds — Covenant to Settle After-acquired Property—Trusts by Reference.*

By a marriage settlement made in 1847, funds belonging to the husband, called "the firstly mentioned trust fund," and a fund belonging to the wife's father, called "the secondly mentioned trust fund," were settled, subject to life interests in the husband and wife, in trust for such children of the marriage as the husband and wife should jointly appoint, and in default as the wife should appoint, and as to the unappointed part, in trust for the children in equal shares, the sons taking vested interests at twenty-one and the daughters at twenty-one or marriage. Then followed a clause providing that no child who should "take any part of the said trust funds" under any appointment made by the husband and wife or the survivor of them under the powers thereinbefore given should take any part of "the said trust funds by virtue of the trusts hereinbefore declared in default of appointment" without bringing his or her share into hotchpot. The settlement also contained a covenant to settle the wife's after-acquired property, which was to be held "upon and for such of the said trusts, intents, and purposes, and under and subject to such of the powers, provisoes and agreements as are herein declared, expressed or contained of and concerning the secondly mentioned trust fund, and the income thereof, as shall for the time being be subsisting or capable of being acted upon and exercised." There were seven children of the marriage, and the husband and wife appointed the whole of "the firstly mentioned trust fund" and "the secondly mentioned trust fund" in favour of five of the children. Subsequently two legacies to the wife came in and were caught by the after-acquired property clause. The husband and wife died without making any further appointment :—

Held, that the two after-acquired legacies formed an accretion to the two original funds and that the five appointees of those funds could not share in the legacies without bringing the shares appointed to them into hotchpot.

In re Cavendish [1912] 1 Ch. 794, distinguished.

Observations on *In re Perkins* (1892) 67 L. T. 743 ; 41 W. R. 170 ; *In re North* (1897) 76 L. T. 186 ; and *In re Marquis of Bristol* [1897] 1 Ch. 946. *In re* FRASER. IND *v.* FRASER
Sargant J. 224

2. —— *Covenant to settle After-acquired Property—"Interest in expectancy"—Marriage Settlement.*

In 1864 a testatrix by her will gave a fifth share of her residuary estate to her daughter W. for life, with remainder to her children, but if she died without issue (which happened) "her share to go to her next of kin as if she had not been married."

In 1865 J., another daughter of the testatrix,

SETTLEMENT—*continued.*

married and by her marriage settlement covenanted that any real or personal property to which she then was entitled for any estate or interest whatsoever in reversion, remainder, or expectancy should be settled upon the trusts of the settlement.

In 1912 W. died without issue and leaving J. her sole next of kin :—

Held, that the interest J. had at the date of her marriage in the settled share of W. was not a mere spes successionis but an "interest in expectancy" which was caught by her covenant. *In re* MUDGE – – – **Neville J. 92**

3. —— *Limitation to Settlor for Life with ultimate Limitation to his "Heir-at-law"—Construction — Marriage Settlement — Land — Rule in Shelley's Case.*

By her marriage settlement G. M. D. conveyed certain freehold and copyhold hereditaments to trustees to hold in trust for her during her life for her separate use, and after her death in trust for such person or persons and in such manner as she should by her will appoint, and in default of and until such appointment and so far as no such appointment should extend "in trust for the heir-at-law of the said G. M. D."

Held, that the rule in *Shelley's Case* (1581) 1 Rep. 93b, did not apply, and that under the limitations of the settlement Mrs. G. M. D. took an estate for life; the person who at her death answered the description of her heir-at-law took an estate for life, and there was a resulting trust in favour of Mrs. G. M. D. as settlor.

Clerk v. *Day* (1594) Cro. Eliz. 313, *Dubber* v. *Trollope* (1734) Amb. 453, and the dictum of Lindley L.J. in *Evans* v. *Evans* [1892] 2 Ch. 173, 186, considered. *In re* DAVISON'S SETTLEMENT. CATTERMOLE DAVISON *v.* MUNBY **Warrington J. 498**

4. —— *Omission of Words of Limitation—Equitable Estate in Freehold and Copyhold Property—Estate for Life of Trustee—Personal Estate subject to Trust for Conversion into Realty — Absolute Interest — Mode of Assurance of Capital Moneys—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 22, *sub-s.* 5 — *Construction of Settlement.*

By a settlement made in 1908 the settlor (being then entitled for a contingent reversionary equitable estate in fee simple to freehold hereditaments and for a corresponding estate to copyhold hereditaments and investments in personalty directed to be held upon the same trusts as capital money arising under the Settled Land Act, 1882, from the freehold hereditaments) granted unto a trustee, first, the freehold and copyhold hereditaments, and secondly the investments, to hold the same as to the freehold hereditaments and the investments "to the use of the trustee according to the customs of the several manors of which they are respectively held"; and it was thereby agreed that the trustee, his executors or administrators, or other the trustee or trustees for the time being, should stand possessed of the freehold hereditaments upon trust for the settlor during his life, and after his death upon such trusts in favour of his widow, children, or remoter issue, or the respective husbands or wives of such children, as he should appoint, and subject thereto, in trust for his sons and daughters in tail, as therein mentioned, with an ultimate trust for the settlor, his heirs and assigns. The copyhold hereditaments were to be held on corresponding trusts, and the investments were to be applied, first, in discharging an incumbrance created by the settlor, and as to the residue (if any) in the purchase of freehold hereditaments to be assured to the trustee or trustees in fee simple upon the same trusts as were thereby declared of the freehold hereditaments thereby assured. On the death of the trustee in 1913 :—

Held, that as to the freehold and copyhold hereditaments the trustee took a life interest only, and that the trusts of the settlement came to an end on the death of the trustee.

Held, however, that as to the investments no words of limitation appropriate to real estate were necessary to pass an absolute interest to the trustee, s. 22, sub-s. 5, of the Settled Land Act, 1882, having made no alteration in the law in this respect, and that the trusts of the settlement did not come to an end on the death of the trustee.

Words of limitation are unnecessary in disposing of the equitable interest either in personal property subject to a trust for conversion into land or in the prospective proceeds of sale of land which is under a trust for conversion into money. The conveyancer can have regard to either the interest in the existing property or the interest in the property which is ultimately to represent the existing property after conversion; and, if either the existing property or the ultimate property is of the nature of personalty, he can properly deal with the equitable interests in that property without using the word "heirs" or its equivalent "in fee simple." *In re* MONCKTON'S SETTLEMENT. MONCKTON *v.* MONCKTON – – – – **Sargant J. 636**

5. —— *Trust for Sale—Absolute Discretion as to Time of Sale—Difficulty of Realization—Proposed Appropriation in Specie—Settled Share — Unauthorized Investments — Jurisdiction of Court.*

Where property is settled on trust for sale as and when the trustees in their absolute discretion think fit, and there is great difficulty in realization, the Court has jurisdiction to sanction an appropriation of the original investments to the shares of the various beneficiaries, including a settled share, although some of the investments appropriated to the settled share are not authorized by the investment clause.

In re Brooks (1897) 76 L. T. 771, followed. *In re Beverley* [1901] 1 Ch. 681, 688, distinguished. *In re* COOKE'S SETTLEMENT. TARRY *v.* COOKE – – – **Astbury J. 661**

—— Estate duty.
See under REVENUE.

—— Hotchpot clause—Several settled funds—Trusts by reference – – – **574**
See WILL. 7.

SETTLEMENT—*continued.*

—— Settled estate.
See under SETTLED ESTATE.

—— Settled land.
See under SETTLED LAND.

—— Will—Construction—Tenant in fee with executory gift over—Unimpeachable for waste—Mining lease—Rents and royalties—"Contrary intention" expressed in settlement—Quality of estate – – – – – **357**
See SETTLED LAND. 2.

SEWAGE FARM — Nuisance — Injunction — Damages – – – – – **434**
See SEWERS.

SEWERS—*Sewage Farm—Nuisance—Discharge of Sewage on Private Land—Smell—Conveyance—Construction—Express or Implied Grant—Agricultural Ditch—Sewer "made by any person for his own profit"—Injunction—Damages—Local Government—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 4; *s.* 13, *sub-s.* 1; *ss.* 15, 16, 17.

An agricultural ditch made by a landowner for the sole purpose of draining his land and fed by surface water alone comes within sub-s. 1 of s. 13 of the Public Health Act, 1875, as a sewer made by a person for his own profit, and does not vest in the local authority.

Sykes v. *Sowerby Urban Council* [1900] 1 Q. B. 584, followed.

By the conveyance on sale to the defendants of a piece of land forming part of the site required by them for a pumping outfall for sewage, there was also granted the free right of passage and running of water from the piece of land through a drain or watercourse drawn on a plan to the conveyance, the defendants cleansing, repairing, or renewing the same so as not to cause a nuisance. The defendants allowed part of the sewage effluent from their farm to flow on to the lands of the plaintiff and into the channel or drain in question, and justified it by express or implied grant from their vendor and also under their statutory powers:—

Held, on the construction of the deed, that there was no express or implied grant of the right to discharge the effluent on to the plaintiffs' land, and the plaintiffs were entitled to an injunction to restrain the defendants from permitting any sewage effluent to be discharged into the ditch or sewer, but the operation of the injunction would be suspended for six months.

Held, further, that the plaintiffs were entitled to 40*s.* damages in respect of each of the claims as to the underground flow of sewage and the nuisance caused by smells. PHILLIMORE *v.* WATFORD RURAL DISTRICT COUNCIL
Eve J. 434

SHAREHOLDERS AND SHARES—Company.
See under COMPANY.

SMELL—Sewage farm—Nuisance—Discharge of sewage on private land—Agricultural ditch—Injunction—Damages – **434**
See SEWERS.

SPECIFIC DEVISE—of reversion—Administration—Will—Lease by testator—Covenant by lessor—Liability for performance after lessor's death – – **491**
See ADMINISTRATION. 2.

SPECIFIC PERFORMANCE — Vendor and purchaser.
See under VENDOR AND PURCHASER.

STANNARIES—*Mining Partnership of Two—"Company"—Winding-up—Jurisdiction—High Court—County Court—Joint Stock Companies Act*, 1849 (12 & 13 *Vict. c.* 108), *s.* 1—*Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 4, 81—*Stannaries Act*, 1869 (32 & 33 *Vict. c.* 19), *ss.* 2, 3—*Stannaries Act*, 1887 (50 & 51 *Vict. c.* 43), *ss.* 2, 3, 28—*Stannaries Court (Abolition) Act*, 1896 (59 & 60 *Vict. c.* 45), *s.* 1—*Partnership Act*, 1890 (53 & 54 *Vict. c.* 39), *s.* 1, *sub-s.* 2 (*c*)—*Companies (Winding-up) Act*, 1890 (53 & 54 *Vict. c.* 63), *s.* 1—*Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *s.* 131, *sub-s.* 4; *ss.* 267, 285.

A partnership of two persons formed to work metalliferous mines in Cornwall is a "company" within the meaning of that term in ss. 2 and 28 of the Stannaries Act, 1887, and is by s. 1, sub-s. 2 (*c*), of the Partnership Act, 1890, excluded from the provisions of that Act; and by virtue of s. 1 of the Stannaries Court (Abolition) Act, 1896, and s. 131, sub-s. 4, of the Companies (Consolidation) Act, 1908, the county courts of Cornwall now have exclusive jurisdiction to wind up such a company.

So *held* by the Court of Appeal, affirming the decision of Neville J. DUNBAR *v.* HARVEY
C. A. 530

STATUTES:—

1623.

21 Jac. 1, c. 16—*Limitation* – – – **206**
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1677.

29 Car. 2, c. 3, s. 4—*Statute of Frauds* – **648**
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—— —— s. 7 – – – – – **473**
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1833.

3 & 4 Will. 4, c. 27, ss. 1, 34—*Real Property Limitation* – – – – **75**
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1845.

8 & 9 Vict. c. 18, s. 80—*Lands Clauses Consolidation* – – – – – **326**
See LANDS CLAUSES ACTS.

1849.

12 & 13 Vict. c. 108, s. 1—*Joint Stock Companies*
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1853.

16 & 17 Vict. c. 137, s. 24—*Charitable Trusts*
See BURIAL GROUND. **690**

STATUTES—*continued.*

1855.

18 & 19 Vict. c. 124, s. 29—*Charitable Trusts Amendment* – – – – 690
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1857.

20 & 21 Vict. c. 77, ss. 75, 77, 78—*Court of Probate* – – – – – 384
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1862.

25 & 26 Vict. c. 89, ss. 4, 81—*Companies* – 530
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—— —— s. 9, sub-s. 4; ss. 14, 71; Sched. II., Form B – – – – – 81
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—— —— s. 9, sub-s. 4; s. 38 – – – 29
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1869.

32 & 33 Vict. c. 19, ss. 2, 3—*Stannaries* – 530
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1874.

37 & 38 Vict. c. 57—*Real Property Limitation* 206
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1875.

38 & 39 Vict. c. 55, s. 4; s. 13, sub-s. 1; ss. 15, 16, 17—*Public Health* – – 434
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—— —— s. 155 – – – – – 444
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—— —— s. 174 – – – – – 407
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1881.

44 & 45 Vict. c. 41, s. 7, sub-s. 1 (*a*)—*Conveyancing and Law of Property* – 39
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—— —— s. 25, sub-s. 2 – – – – 96
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1882.

45 & 46 Vict. c. 38, ss. 6, 11; s. 58, sub-s. 1 (ii.)—*Settled Land* – – – – 357
See SETTLED LAND. 2.

—— —— s. 11 – – – – – 210
See SETTLED LAND. 1.

—— —— s. 22, sub-s. 5 – – – – 636
See SETTLEMENT. 4.

1884.

47 & 48 Vict. c. 72, ss. 3, 5—*Disused Burial Grounds* – – – – – 690
See BURIAL GROUND.

1887.

50 & 51 Vict. c. 43, ss. 2, 3, 28—*Stannaries* 530
See STANNARIES.

STATUTES—*continued.*

1890.

53 & 54 Vict. c. 39, s. 1, sub-s. 2 (*c*)—*Partnership* 530
See STANNARIES.

53 & 54 Vict. c. 63, s. 1—*Companies* (*Winding-up*) 530
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1893.

56 & 57 Vict. c. 73, s. 26, sub-ss. 1, 3—*Local Government* – – – – 464
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1894.

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1896.

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1897.

60 & 61 Vict. c. 65, ss. 1, 2, 24—*Land Transfer* 384
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1905.

5 Edw. 7, c. 15, ss. 3, 12—*Trade Marks* – 291
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8 Edw. 7, c. 38—*Irish Universities* – – 331
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8 Edw. 7, c. 69, ss. 10, 118; Sched. III., Form B —*Companies* (*Consolidation*) – 81
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—— —— s. 123 – – – – – 29
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—— —— s. 131, sub-s. 4; ss. 267, 285 – 530
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—— —— s. 193 – – – – – 26
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—— —— ss. 206, 207, 208 – – – 103
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—— —— s. 209, sub-s. 1 (*b*) – – – 279
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8 Edw. 7, c. clxvii., s. 4, sub-s. 2—*London Electric Supply* – – – 248
See ELECTRIC LIGHT.

1909.

9 Edw. 7, c. 49, ss. 1, 17; Sched. VI.—*Assurance Companies* – – – – 103
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STREETS — *Building in Street — Old Lane — Building Line for whole Street—Prescribing — Rebuilding—Notice — Compensation — Payment or Tender — Refusal to set back — Mandatory Injunction to pull down—Local Government—*

STREETS—*continued.*

Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 155.

Action based on s. 155 of the Public Health Act, 1875, for an injunction to compel the defendant to remove a building completed before writ issued.

The defendant owned a house in a street and, being desirous of pulling it down and rebuilding it on the same site, duly deposited plans with the local authority. The latter thereupon adopted a plan shewing a building line for the whole of the street which cut a considerable slice off the site of the defendant's house. This plan did not refer expressly to the house. The authority further resolved that his deposited plan "be not approved" and wrote to him to that effect. Correspondence ensued; the defendant insisted on rebuilding on the site of the old house, and completed the new building. The authority did not give him notice under which section of the Act they were proceeding or make any tender of compensation; but they commenced this action for a mandatory injunction to compel the defendant to pull down so much of the structure as was in advance of the building line. By their statement of claim they alleged that they had at all times been and now were ready to pay compensation:—

Held, reversing the decision of Joyce J., that a building line had been duly prescribed and that the fact that it purported to refer to the whole of the street in general terms was immaterial; that it was not necessary to give notice, and that in fact the defendant's advisers knew, under which section the proceedings were taken; that tender of compensation was not a condition precedent to enforcing compliance with the building line, and, if it was, the defendant by his hostile attitude had waived the objection; that the dispute was trivial, but the defendant had challenged the local authority and could not be allowed to avoid compliance with the building line; and that a mandatory injunction must be granted. ATTORNEY-GENERAL *v.* PARISH – – – **C. A. 444**

—— Market—Charter days—By day—Streets subject to market rights—Presumption of lost grant—Dedication subject to obstruction – – – – **140**
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STRIKING OUT—Alleged right of way—Action by landowner for trespass — District council added as defendants—Pleadings — Motion to strike out defence of district council as embarrassing – **444**
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SURETY.
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TENANT—Landlord and.
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TENDER—Building in street—Notice—Compensation—Payment or tender—Refusal to set back—Mandatory injunction to pull down – – – – – **444**
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TIME—Vendor and purchaser—Sale of land—Contract—Specific performance – **648**
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TITLE — Implied covenants for title — Conveyance—Damages – – – **39**
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TITLE DEEDS—Mortgages—Priority – **18**
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TOLLS — Market — Private market — Tolls — Reasonable — Payment by sellers — Publication of charges – – **140**
See MARKET.

TRADE—Master and servant—Trade secret—Secret process — Confidential employment—Implied obligation of servant.
See MASTER AND SERVANT. **239**

TRADE MARK—*Application for Registration—Mark not presently intended for Use in Connection with Goods in the United Kingdom—Appeal from Comptroller-General—Grounds of Objection — Trade Marks Act*, 1905 (5 *Edw.* 7, *c.* 15), *ss.* 3, 12.

A trade mark, to be within the definition in s. 3 of the Trade Marks Act, 1905, must be one which is used or proposed presently to be used in connection with goods of the owner of the mark dealt with by him in the United Kingdom.

The N. Company, which had in a canton of Switzerland the sole concession for working certain asphalte mines and had a trade mark there, was bound by agreement with an English company, the V. de T. Company, to supply the latter with all asphalte which it required for the United Kingdom and not to supply asphalte to any other person in the United Kingdom; and the agreement was to endure until 1926. The V. de T. Company had registered in England a trade mark in connection with the asphalte sold by it. The asphalte supplied by the N. Company was delivered in Switzerland to the V. de T. Company:—

Held, that the N. Company was not entitled to register a trade mark in England in respect of its asphalte during the continuance of the agreement.

On an appeal under s. 12 of the Trade Marks Act, 1905, from the refusal of the Comptroller-General to allow an application for registration of a trade mark to proceed, an opponent to registration who was not before the Comptroller-General but has been brought in for convenience on the appeal is not confined to the objections which have been relied on by the Comptroller-General. *In re* NEUCHATEL ASPHALTE COMPANY'S TRADE MARK – – **Sargant J. 291**

2. —— *Application to register Surname—Distinctive Mark — Order of Board of Trade*

TRADE MARK—*continued.*

directing Registrar to proceed with Application—Registration—Application to remove Mark from Register—Effect of Order of Board of Trade—Passing off—Action to restrain—Use by Defendant of his own Name—Trade Marks Act, 1905 (5 *Edw.* 7, *c.* 15), *s.* 9, *par.* 5; *ss.* 35, 44.

A preliminary order of the Board of Trade or the Court under s. 9, par. 5, of the Trade Marks Act, 1905, directing the Registrar of Trade Marks to proceed with an application to register a surname as a trade mark merely enables the application to proceed as if it were an ordinary and not a special application, and is in no way final or conclusive so as to prevent the Registrar from subsequently refusing the application for registration on its merits, or to preclude the Court upon an application, after registration, by a person aggrieved under s. 35 from expunging the entry on the ground that the trade mark is not in fact distinctive.

Decision of Warrington J. [1913] 1 Ch. 191, reversed on this point.

A surname is not necessarily incapable of being a registrable trade mark. It may be registered, for instance, where it is an uncommon name and its user has been so extensive that it has in fact become distinctive, within s. 9 of the Trade Marks Act, 1905, for the goods with respect to which it is registered or proposed to be registered. Applications to register surnames ought, however, to be closely scrutinized, and registration only permitted where the distinctive character of the mark is clearly proved.

Teofani & Co., Limited, and their predecessors in business had for more than twenty years traded in London as tobacco and cigarette manufacturers, and during that period had used the name "Teofani" as a trade mark to an extent which, in the opinion of the Court, made it in fact "distinctive" for cigarettes. The name was uncommon, there being only one person (A. Teofani) in the United Kingdom who bore it besides the predecessors in business of the company. In 1909 the company obtained an order of the Board of Trade under s. 9, par. 5, of the Trade Marks Act, 1905, for the registration of the name "Teofani" as a trade mark.

On appeal from the refusal of Warrington J., on the application of A. Teofani, to order the removal of the mark from the register:—

Held, that the mark was properly registered.

The plaintiffs, Teofani & Co., Limited, and their predecessors in business had for many years manufactured and sold cigarettes as "Teofani's cigarettes," under which description they had become well known to the trade and the public. In 1909 the plaintiffs caused the name "Teofani" to be registered as their trade mark. In 1911 the defendant, Athanasius Teofani, commenced to make and sell cigarettes under the description of "A. Teofani's cigarettes."

In an action to restrain passing off and infringement of the plaintiffs' trade mark Warrington J. granted an injunction restraining the defendant from selling or offering for sale cigarettes as "A. Teofani's cigarettes" or otherwise marking his goods with the name "Teofani," either with or without other names, without clearly distinguishing such cigarettes from those of the plaintiffs, and from infringing the trade mark:—

Held, on appeal, that the injunction was rightly granted. TEOFANI & CO., LIMITED *v.* A. TEOFANI. *In re* TEOFANI & CO.'S TRADE MARK - - - - - - C. A. 545

TRANSFER—Land transfer.
See under LAND TRANSFER.

TREES—Cutting down—Injunction—Damages—Rights of common—Turbary—Estovers—Nuisance—Abatement—Excessive trespass - - - 349
See MANOR.

TRESPASS—Alleged right of way—Action by landowner for trespass—District council added as defendants—Pleadings - 464
See LOCAL GOVERNMENT.

—— Common, Rights of—Trespass by commoner—Serious injury to waste—Suit by fellow commoner—Injunction - - 416
See COMMON.

—— Common, Rights of—Turbary—Estovers—Nuisance—Abatement—Excessive trespass—Cutting down trees—Injunction—Damages - - - - 349
See MANOR.

—— Demise of first floor office—Right to fix flower boxes outside office windows—Demise of both sides of outer wall 312
See LANDLORD AND TENANT.

TRUST.
See under TRUSTEE.

TRUSTEE—*Breach of Trust—Appropriation of Security by Defaulting Trustee to meet Breach of Trust—Declaration of Trust—Trustee and Cestui que Trust—Equitable Mortgage—Irrevocable Declaration—Statute of Frauds* (29 *Car.* 2, *c.* 3), *s.* 7.

In all cases where it is alleged that a defaulting trustee has appropriated securities to make good his breaches of trust, and a declaration of trust is relied on, the Court must be satisfied that a present irrevocable declaration has been made.

The Court refused to accept as evidence of such a declaration of trust pencil entries in private accounts kept by the defaulting trustee never communicated to any one, and which in some cases appeared to have been altered.

Semble the absence of communication in itself raises a strong inference against an intention to make the appropriation irrevocable. *Middleton* v. *Pollock* (1876) 2 Ch. D. 104, explained. *In re* COZENS. GREEN *v.* BRISLEY - Neville J. 478

—— Charity—Trustees—Scheme—Endowment for a "sermon" once a year—Increase in the income—Cyprès—Religious purposes - - - - - 261
See CHARITY. 2.

TRUSTEE—*continued.*

—— Hotchpot clause—Settled funds—Covenant to settle after-acquired property—Trusts by reference – – – – 224
See SETTLEMENT. 1.

—— Reference, Trusts by—Settlement—Hotchpot clause—Several settled funds 574
See WILL. 7.

—— Settlement—Omission of words of limitation—Equitable estate in freehold and copyhold property—Estate for life of trustee
See SETTLEMENT. 4. 636

—— Settlement—Trust for sale—Difficulty of realization—Proposed appropriation in specie — Unauthorized investments—Jurisdiction of Court – – – 661
See SETTLEMENT. 5.

TURBARY—Rights of common — Estovers — Nuisance—Abatement—Excessive trespass—Cutting down trees—Injunction—Damages – – – – 349
See MANOR.

UNIVERSITY—Irish University Act, 1908—Charity — Will — Construction — Legatee, whether sufficiently described
See CHARITY. 1. 331

VENDOR AND PURCHASER — *Condition negativing Compensation—Conveyance—Parcels — Plan — Falsa demonstratio — Implied Covenants for Title—Omission to prevent Acquisition of Title under Statute of Limitations—Liability of Vendor—Measure of Damages—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 7, *sub-s.* 1 (*A*).

In 1911 the vendor as beneficial owner conveyed to the purchaser a farm with the messuage, closes, or parcels of land belonging thereto, called Bank Hey Farm, containing 84a. 3r. 4p. or thereabouts, and in the occupation as to part thereof by T. H. and as to the remainder thereof by C. W. C., all which said premises were more particularly described in the plan indorsed thereon and coloured red. The plan included a small strip of land some 100 feet long by 36 feet wide which had formerly formed part of Bank Hey Farm, but as to which it was admitted for the purposes of this action that at the date of the conveyance an adverse title under the Statute of Limitations had been acquired by adjoining owners, and in the view the Court took of the evidence the acts of the adjoining owners had been brought to the notice of the vendor, who became entitled in possession to the property in 1900 under the will of a testator who died in 1883. Condition 14 of the conditions of sale under which the vendor sold provided that any incorrect statement in the particulars was not to annul the sale, nor was the vendor or purchaser to be allowed compensation in respect thereof. In an action by the purchaser to recover damages from the vendor under the covenants for title implied by the

VENDOR AND PURCHASER—*continued.*

vendor conveying this strip of land as beneficial owner:—

Held, that the inclusion of the strip on the plan could not be rejected as falsa demonstratio and must prevail, and that the strip of land was included in the parcels conveyed.

Held, also, that condition 14 did not, after the execution of the conveyance, prevent the purchaser from recovering damages against the vendor under the covenants for title implied by the vendor conveying as beneficial owner in any case to which such covenants were applicable.

Bos v. *Helsham* (1866) L. R. 2 Ex. 72, distinguished.

Held, also, that the omission under the circumstances to prevent the adjoining owners from acquiring or completing the acquisition of a title under the Statute of Limitations constituted a thing "omitted or knowingly suffered" on the part of the vendor within the meaning of the implied covenant for right to convey, and that it was immaterial that the vendor was under no duty to any one at the time to prevent it.

Held, also, that the measure of damages was not the difference in price which would have been obtained at the sale if the disputed strip had not been included in the lot sold, but the difference in value of the land as purporting to be conveyed and the land as it actually passed to the purchaser.

Turner v. *Moon* [1901] 2 Ch. 825, followed.
EASTWOOD *v.* ASHTON – **Sargant J. 39**

—— Probate—Revocation—Supposed intestacy—Grant of letters of administration—Sale of real estate by administratrix—Subsequent discovery of will appointing executors — Invalidity of purchaser's title – – – – – 384
See PROBATE.

—— Sale of land—Contract—Term left open to offer and acceptance—Term solely in vendor's favour—Waiver by vendor at the Bar – – – – – 648
See FRAUDS, STATUTE OF.

VOLUNTARY LIQUIDATION—Company.
See under COMPANY.

WAIVER—Vendor and purchaser—Sale of land—Contract—Term left open to offer and acceptance—Term solely in vendor's favour—Waiver by vendor at the Bar
See FRAUDS, STATUTE OF. 648

WASTE—Common, Rights of — Trespass by commoner—Serious injury to waste—Suit by fellow commoner—Injunction
See COMMON. 416

—— Settled estate — Will — Construction — Tenant in fee with executory gift over—Unimpeachable for waste — Mining lease—Rents and royalties—"Contrary intention" expressed in settlement—Quality of estate – – – 357
See SETTLED LAND. 2.

WAY, RIGHT OF—Alleged right of way—Action by landowner for trespass—District council added as defendants—Pleadings – – – – – **464**
See LOCAL GOVERNMENT.

WILL—*Appointment—Excessive Exercise—Contingent Class—Objects—Non-objects—Ascertainment at Future Period—Construction of Will.*

J. W. by her will gave to her daughter E. R. a power to appoint funds "in favour of all . . . . or any one or more of the child or children or other issue or both of my said daughter E. R. as may be living at her death." E. R. by her will appointed that the funds should be held in trust for her children who should attain twenty-one or marry in equal shares. She then directed the trustees to retain the shares of each of her daughters and pay the income to her for life for her separate use without power of anticipation and after the decease of such daughter in trust for her children or remoter issue (such remoter issue being born in her lifetime) in such manner as she should by deed or will appoint; and in default of appointment for the daughter's children who should attain twenty-one or marry.

J. W. died in 1888. E. R. died in 1911, leaving eight children. One of her daughters, who was born before the death of J. W. and had four children, all born before the death of E. R., was the plaintiff, and she claimed that the settlement of the share appointed to her was void inasmuch as it might apply to non-objects of the power; that the original appointment in her favour was therefore not cut down; and that she took the share absolutely:—

Held (affirming the decision of Warrington J.), that the provisions for a settlement were only void so far as they might apply to non-objects of the power, and that this must be ascertained at the death of the plaintiff. The law on the point was settled by *Sadler* v. *Pratt* (1833) 5 Sim. 632, *Harvey* v. *Stracey* (1852) 1 Drew. 73, and *In re Farncombe's Trusts* (1878) 9 Ch. D. 652, and was no longer open to discussion. *In re* WITTY. WRIGHT *v.* ROBINSON **C. A. 666**

2. —— *Charge of Legacies and Debts on Specific Realty and Personalty in Foreign Country — Mixed Fund — Non-exoneration of Residuary Personalty—Rule of Construction—Order of Administration—Will—Construction.*

By his will made in 1905 the testator, after appointing executors and trustees, gave certain legacies free of duty, and subject to the payment of the said legacies and duties, and his funeral and testamentary expenses and debts, he devised and bequeathed all his real estate situate in the Argentine Republic, including therein chattels real and land of whatsoever nature, together with farming stock, crops, and household and farming effects and consumable stores and provisions in or about his real estate in the Argentine, unto his trustees upon trust to sell, and after payment of the expenses of such sale to pay the residue to the children of his two brothers in equal shares; and the testator devised and bequeathed the residue of his real and personal estate to his trustees in trust for his nephew, the plaintiff.

The testator died in 1910, domiciled in England, and on a question being raised on summons whether the testator had charged his real and personal estate in the Argentine with the payment of legacies, duties, and debts, in exoneration of his residuary estate:—

Held, (i.) that, on the true construction of the will, the charge was confined in its operation to the Argentine property;

(ii.) that the rule of construction which required that there must be found in the will an intention not only to charge the realty, but to discharge the personalty, applied to realty situate outside the jurisdiction;

(iii.) that the fund charged was not a true mixed fund within the authority of *Roberts* v. *Walker* (1830) 1 Russ. & My. 752, inasmuch as there was no trust for conversion of the whole real and personal estate for the purposes of satisfying the charge.

Held, therefore, that the devise of real estate in the Argentine charged with these payments made it an auxiliary fund to the personalty, but did not operate to exonerate the personalty from its primary liability.

But *held* that, as the rule of construction applicable to realty had no application to the personalty, the concurrent charge of legacies and debts on the specifically bequeathed personalty did exonerate the residuary personalty from its primary liability. *In re* SMITH. SMITH *v.* SMITH – – – – – **Eve J. 216**

3. —— *Gift of Income for her Life or until a certain Event—Gift over on that Event happening—Non-happening of Event—Determinable Life Interest—Construction of Will.*

A testator gave one fourth of his residue to trustees in trust to pay the income thereof to his daughter E. during her life or until she should receive the legacy of 20,000*l.* left to her under the will of D. (who was then dead), and then that "the one fourth share of my residuary estate and the income arising therefrom which I have bequeathed to her" should fall into residue and be divided between his three other children. E. survived the testator and died without receiving the legacy, which could never be paid owing to the insolvency of D.'s estate:—

Held, (1.) that the words of the gift over were not sufficient to enable the Court to imply an absolute gift in any event to E.; (2.) that E. took only a terminable life interest; and (3.) that on E.'s death the gift over took effect.

The principle of *Luxford* v. *Cheeke* (1684) 3 Lev. 125; *Browne* v. *Hammond* (1858) John. 210; *Etches* v. *Etches* (1856) 3 Drew. 441; and *In re Cane* (1890) 60 L. J. (Ch.) 36, applied. *In re* SEATON. ELLIS *v.* SEATON – **Parker J. 614**

4. —— *Gift of Residue to Forty-six named Persons—Codicil—Revocation of Gift to Two of the Number—Confirmation of Will—No Intestacy—Will—Construction.*

By his will, dated in 1906, the testator gave the proceeds of sale of his residuary real and personal estate upon trust to be divided equally

WILL—*continued.*

between forty-six named persons, described in the will as being children, or the widows or children of deceased children, of his and his wife's brothers and sisters, including T. W. and F. W. By a codicil he revoked the gifts of the shares in his residuary estate to T. W. and F. W., and in all other respects confirmed his will :—

Held that, although the gift was not a gift to a class, there was no intestacy as to any portion of the residue, but that the whole residue passed under the will, as altered and republished by the codicil, to the persons named in the will omitting F. W. and T. W.

Cheslyn v. *Cresswell* (1763) 3 Bro. P. C. 246, distinguished. *In re* WHITING. ORMOND *v.* DE LAUNAY - - - - **Joyce J. 1**

5. —— *Gift to "Children" — Exclusion of Illegitimate Children—Construction of Will.*

A testatrix by her will dated in 1911 gave the residue of her property in trust for her brother F. during his life, and after his death in trust for "all or any the children or child of" F. living at the death of the survivor of testatrix and F., "and the children or child then living of any deceased child of his who, whether children or grandchildren, being male attain the age of twenty-one years or being female attain that age or marry."

At the dates of the will and the testatrix's death respectively F. had six illegitimate children living (who had been borne to him by K., to whom he was reputed to be married and who died in 1900), and two legitimate children by his marriage in 1904 with S. K. was throughout supposed to be and was accepted as F.'s wife in the society in which they moved ; her six children were received as legitimate children ; and the testatrix knew them all and was fond of some of them. The testatrix and F. both died in 1911 :—

Held, that only the two legitimate children took under the gift.

In re Brown (1890) 63 L. T. 159, followed.

In re Du Bochet [1901] 2 Ch. 441, not followed. *In re* PEARCE. ALLIANCE ASSURANCE COMPANY *v.* FRANCIS - - **Sargant J. 674**

6. —— *Hotchpot, Provision for — Supplying Omission by Inference—Will—Construction.*

The testator directed three several sums which he had charged upon his real estate to be raised and held upon the ordinary trusts of a settled legacy in favour of each of his cousins A., B., and C. and her issue. Subject to the charge he devised his real estate upon certain limitations, which had since determined, with an ultimate trust for sale and division of the proceeds equally between such of his five named cousins, including A., B., and C., as should be living when the trust for sale came into operation, but subject to the following provision for hotchpot :—"but so that if" A., B., and C. "or any of them shall then be living or shall have previously died leaving issue then living such of the said sums . . . . hereinbefore directed to be set apart for their benefit as shall have been so set apart for the benefit of the one or more of them so dying and her issue shall be brought into hotchpot and accounted for in the division hereby directed to be made of the net proceeds of my family estate." The will contained a subsequent declaration that the child or children attaining twenty-one, or if daughters marrying, of such of his five cousins as should be dead when the trust for sale came into operation should take the share in the net proceeds of his family estate which his, her, or their parent would have taken if such parent had not died before the trust for sale had come into operation.

C. died before the trust for sale came into operation leaving a child still living, and the question to be determined was whether A. and B., as well as C.'s child, were bound to bring into hotchpot their settled legacies :—

Held, that the later portion of the hotchpot clause must be read as applying to each of the two contingencies mentioned in the introductory portion, and that in the division of the proceeds of the testator's real estate A. and B., as well as C.'s child, must bring their settled legacies into hotchpot. *In re* HAYGARTH. WICKHAM *v.* HAYGARTH - - - - **Joyce J. 9**

7. —— *Hotchpot Clause — Several Settled Funds—Trusts by Reference—Settlement—Construction.*

A testator gave three separate funds to trustees upon trusts, fully set out in each case, for his three children respectively for life, with remainder to their issue as they should respectively appoint, and in default of appointment to their respective children in equal shares with a hotchpot clause. In each case the testator gave the fund over, on failure of the express trusts, upon trusts in favour of his other children and their issue successively, by reference to the trusts expressly declared in favour of such children and their issue concerning the fund given in trust for them in the first instance.

In the events which happened, a granddaughter of the testator became entitled to one fund by appointment, and to a share in another fund in default of appointment.

Held, affirming the decision of Neville J. [1913] 1 Ch. 303, that the granddaughter was entitled to take her share in the unappointed fund without bringing into hotchpot the fund which she took by appointment.

In re MARKE WOOD, SENIOR. *In re* MARKE WOOD, JUNIOR. WODEHOUSE *v.* WOOD **C. A. 574**

8. —— *Legacy—Interest—Legacy payable at Twenty-one—Power to Trustees to apply Legacy in or towards Maintenance of Legatee—Additional Funds provided for Maintenance—Will—Construction.*

Testatrix, by her will as altered by a first codicil thereto, bequeathed a legacy of 900*l.* to her grand-niece A. A., if she should attain the age of twenty-one years, but so that the trustees should be at liberty in their absolute discretion to apply the whole or any portion of it in or towards her maintenance and education. The testatrix also by her will made provision for the maintenance and education of A. A. out of other funds, and by a fourth codicil thereto she

WILL—*continued.*

bequeathed to her all the money standing to the credit of her current or deposit account and devised to her a freehold house. A. A. was an infant of the age of thirteen years :—

Held that, the testatrix having made provision for the maintenance and education of A. A. out of other funds, the legacy of 900*l.* only carried interest from the time when she attained the age of twenty-one years.

Pett v. *Fellows* (1733) 1 Swans. 561, n., as explained by Sugden L.C. in *Leslie* v. *Leslie* (1835) Ll. & G. t. Sug. 1, 3, and *In re Churchill* [1909] 2 Ch. 431, distinguished. *In re* WEST. WESTHEAD *v.* ASPLAND – **Warrington J. 345**

9. —— *Misdescription—Latent Ambiguity—Falsa demonstratio.*

Testator, who died in 1913, by his will made in 1908, appointed an executor and directed "my two freehold cottages or tenements, with their appurtenances, situated at Trowbridge, known as Nos. 19 and 20 Castle Street," to be sold by auction and the proceeds to be divided between two of his daughters. He also specifically devised his freehold cottage or tenement known as No. 35, The Conigre, Trowbridge, to one of his sons, and his freehold cottage or tenement known as No. 39, Castle Street, Trowbridge, to another daughter. There was no residuary devise. At the date of his will and death the testator owned freehold premises known as Nos. 19 and 20, Thomas Street, Trowbridge, in addition to No. 35, The Conigre, and No. 39, Castle Street, but Nos. 19 and 20, Castle Street were not and never had been the testator's property :—

Held, that in the description of Nos. 19 and 20 the words "Castle Street" ought to be rejected as falsa demonstratio merely, and that Nos. 19 and 20, Thomas Street passed under the specific devise, the testator having no other houses in Trowbridge so numbered *In re* MAYELL. FOLEY *v.* WOOD – **Warrington J. 488**

—— Abatement—Legacy on release of annuity under a settlement — Deficiency of assets – – – – – **56**
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—— Administration—Insolvent estate—Receiver—Executor surety for testator—Right of indemnity—Right of retainer – **595**
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—— Administration — Lease by testator — Covenant by lessor—Specific devise of reversion — Liability for performance after lessor's death – – – **491**
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—— Debt — Residuary devise and bequest — Trust to pay debts out of mixed fund—Debt, whether barred against personal but not against real estate – – **206**
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—— Executors.
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—— Settled estate — Tenant in fee with executory gift over — Unimpeachable for waste—Mining lease—Rents and royalties — "Contrary intention" expressed in settlement — Quality of estate – – – – – **357**
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WINDING-UP—Company.
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—— Insurance company.
See under INSURANCE COMPANY.

WINDOWS—Demise of first floor office—Right to fix flower boxes outside office windows—Trespass—Demise of both sides of outer wall – – – – **312**
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WORDS—"Children" – – – – **674**
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—— "Company" – – – – – **530**
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—— "Contrary intention" expressed in settlement – – – – – **357**
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—— "Heir-at-law" – – – – **498**
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—— "Sermon" – – – – – **261**
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—— "Servants" – – – – – **279**
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